IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. ~~78~~ 78-5283

xxxxx

JAMES A. JACKSON,

Petitioner

versus

COMMONWEALTH OF VIRGINIA
and
R. ZAHRADNICK, Warden,

Respondent

xxxxx

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

xxxxx

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, James A. Jackson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered August 3, 1978.

OPINION BELOW

The Court of Appeals entered its opinion on August 3, 1978. A copy of that opinion, reversing the District Court, is attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1). The Petitioner is an inmate of the Virginia Correctional System, avows that he is held in custody in violation of the Constitution and that his

Petition for Writ of Habeas Corpus in challenging his conviction should be granted.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals for the Fourth Circuit erred in finding "some" evidence of premeditation thereby denying Petitioner his due process rights?

2. Whether the Court of Appeals for the Fourth Circuit erred in denying the writ of habeas corpus on the basis of the rule in Thompson v. City of Louisville, 362 U.S. 199 (1960) thereby denying Petitioner his due process rights?

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law ....

STATEMENT OF THE CASE

The Petitioner was convicted of first degree murder in the Circuit Court of Chesterfield County, Virginia on March 27, 1975 and was sentenced to 30 years in prison. His conviction subsequently was appealed unsuccessfully to the Supreme Court of Virginia on February 10, 1976. As a result of the denial of the grounds of appeal by that court, Petitioner filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Eastern District of Virginia on June 18, 1976. The Honorable D. Dortch Warriner ordered that a Writ of Habeas Corpus be issued and a new trial be commenced within sixty days from the entry of the Order on October 1, 1976. In a memorandum filed on that same day the Court found that there was a lack of evidence showing the element of

premeditation required for a conviction of murder in the first degree. The Respondents appealed that decision to the United States Court of Appeals for the Fourth Circuit. The case was docketed as 77-1205. In a per curiam opinion dated August 3, 1978, the Fourth Circuit reversed the order of the District Court.

A statement of the facts of this case which are material to a consideration of the questions presented would be as follows with references to the Appendix filed with the United States Court of Appeals for the Fourth Circuit indicated as "(A.____)."

The Petitioner first met the deceased, Mrs. Mary Cole [hereinafter Mrs. Cole], a cook for the Chesterfield County Jail when he was an inmate of the jail. [A.75]. Upon his release Mrs. Cole befriended him, with some indication that she wished him to stay with her. Contrary to this desire the Petitioner arranged to stay with Mrs. Cole's son Curtis and his family. [A.64]. Apparently the Petitioner and Mrs. Cole met one another on several occasions during the approximately one month period that he stayed with the Curtis Cole family.

Between 5:30 and 6:00 p.m., of the day of Mrs. Cole's death she drove to her son's home and picked up the Petitioner. [A.46]. By this time of day the Petitioner had already drank several bottles of liquor and had purchased an additional twelve cans of beer. According to the testimony of Curtis Cole, Jackson was "pretty well loaded." [A.70]. Mrs. Cole had also been drinking beforehand.

The two drove to a diner where they were observed by three police officers. One of the three, a deputy sheriff, observed a revolver sticking out of Jackson's pants. The deputy sheriff testified that the Petitioner at this time "was in a pretty rough condition," [A.80] and that both were "loaded." [A.86].

Once outside the deputy asked to see the gun, a .38 caliber revolver, used by the Petitioner in target practice with Curtis Cole earlier that afternoon. [A.49]. The deputy examined the gun and asked if he could keep it until the Petitioner had sobered. [A.86]. Apparently when Mrs. Cole said that they were going straight home, the deputy returned the gun to the Petitioner and did not confiscate Mrs. Cole's butcher knife seen in the front seat of the car. [A.82]. As the two were leaving the diner, the Petitioner told the deputy that they were planning some form of sexual activity and Mrs. Cole smiled and laughed. [A.87]. From that point onward the facts are based on a statement later given by the Petitioner to the police.

Before driving away from the diner, he and Mrs. Cole exchanged words which led to Mrs. Cole trying to stab the Petitioner with her butcher knife with words to the effect that if she could not have him then no other woman would have him. The Petitioner explained that the argument centered on his refusal to have sex with Mrs. Cole. He pushed her away and struck her on the back of the head with the butt of the revolver. The Petitioner said that when he then left the car and crossed the street to call a cab, Mrs. Cole drove up and persuaded him to get in the car again. From there Mrs. Cole drove to a secluded church where, according to the Petitioner, the two of them began "messing around." In this period of time together, the Petitioner reported that he drank a fifth of Old Crow, a fifth of Wild Turkey, and a pint of _____. Mrs. Cole apparently helped him drink both the whiskey, and an undetermined amount of beer. [A.106].

At the church Mrs. Cole again sought sexual relations, which the Petitioner refused. With both of them now outside the car, Mrs. Cole, naked from the waist down, picked up the butcher knife and tried to stab him. He fired the revolver

into the ground six times to warn her away, and then reloaded. Mrs. Cole threw down the knife and tried to wrest the gun away from him. [A.104]. In the ensuing scuffle two shots were fired killing Mrs. Cole. [A.119].

The Petitioner fled to Fayetteville, North Carolina in Mrs. Cole's car. He went to Florida and later returned to Fayetteville where he was arrested and returned to Chesterfield County, Virginia.

REASONS FOR GRANTING THE WRIT

Under the rationale of Thompson v. City of Louisville, 362 U.S. 199 (1960), the due process question turns upon the absence of "some" evidence to support each element of the offense. The Petitioner claims that his conviction of murder in the first degree was unsupported by any evidence of premeditation, a necessary element of murder of the first degree in Virginia, and thus he was deprived of his due process right. Va. Code Ann. § 18.2-32.

The one central fact that permeates the pages of the transcript is that the Petitioner was extremely intoxicated at the time of the killing. This conclusion can be gleaned from the testimony of a wide variety of witnesses whose integrity and judgment have never been questioned. Witnesses who testified to this fact included the daughter-in-law of the deceased, the son of the deceased, and more important in terms of time, Deputy Sheriff Andrews. Between 6:00 and 7:00 p.m. the deputy observed the two at the diner and became so concerned with the Petitioner's physical state that he advised the deceased to drive the car rather than allowing him to do so since the latter was "too drunk" to drive. [A.86].

Mr. Daniels, the attorney appointed to represent the Petitioner at the trial court level, referred to the laboratory report of the Chief Medical Examiner. This report introduced

into evidence by the Commonwealth, apparently showed that at the time of her death, the deceased had blood alcohol of 0.17%.

The American Medical Association and the National Safety Council adopted the following policy statement in regard to the alcohol level in the bloodstream:

> 'Blood alcohol of 0.10% can be accepted as prima facie evidence of alcoholic intoxication.' [A. Moenssens, R. Moses & F. Inbau, Scientific Evidence in Criminal Cases, 238 (1973)].

Therefore, if Mrs. Cole had at the time of her death a blood alcohol level well in excess of that level deemed to indicate intoxication, then surely the Petitioner was at least as intoxicated as she. This can be inferred from the testimony of the deputy when he stated that "[t]hey had been drinking, I would say Mr. Jackson had more than Mrs. Cole, it appeared to be that way." [A.80]. It is thus safe to say that the Petitioner, after drinking the entire day, was plainly very intoxicated at the time of the killing.

It is a matter of basic hornbook law, long held to be true in the State of Virginia, that a mind may be so bewildered from intoxicating beverages as to be entirely incapable of deliberation. Cody v. Commonwealth, 180 Va. 449, 23 S.E.2d 122 (1943); Drinkard v. Commonwealth, 165 Va. 799, 183 S.E. 251 (1936); Little v. Commonwealth, 163 Va. 1020, 175 S.E. 767 (1934); Gills v. Commonwealth, 141 Va. 445, 126 S.E. 51 (1925); Johnson v. Commonwealth, 135 Va. 524, 115 S.E. 673 (1923); Honesty v. Commonwealth, 81 Va. 283 (1886); Willis v. Commonwealth, 73 Va. (32 Gratt.) 929 (1879); Boswell v. Commonwealth, 61 Va. (20 Gratt.) 860 (1871); 40 Am. Jur. 2d Homicide §§ 128, 129 (1968); 22 C.J.S. Criminal Law § 68 (1961); 9 Michie's Jurisprudence Homicide § 23 (1950); 10A Va. and W. Va. Digest Homicide § 28 (1972). Therefore, one in this state is incapable of premeditated killing even though the intoxication is voluntarily induced. From all the evidence, it is

apparent that the Petitioner was in such a state of intoxication that he was incapable of a premeditated killing.

The decision of the United States Court of Appeals for the Fourth Circuit at page 9, states that it had no power to reconsider the bits of pieces upon which the trial judge based his ultimate finding that there was insufficient evidence of intoxication. It is respectfully submitted that that is the duty of the court when the discussion of intoxication is so significant to the entire issue of premeditation.

Admittedly the events at the death scene sound bizarre as related by a man whose intoxication at the time was substantial. Seemingly the statement given by Jackson shows two individuals in a drunken stupor who quarreled over whether they would have sexual relations. A knife appeared and then a gun. Mrs. Cole was shot twice.

The Appeals Court put great weight on the argument that one shot might have been fired accidentally, but not two. This conclusion would be much more acceptable if there was evidence showing that the .38 revolver was not an automatic. Certainly then deliberation would have been necessary to fire the gun the second time. However, no such evidence can be found in the record and therefore any conclusion that the firing of two shots proves "some" evidence of premeditation is unwarranted. All the records shows is that a struggle ensued with two shots fired. Certainly if one is so intoxicated as to be entirely incapable of deliberation, the number of shots, whether one or two, is irrelevant. It is submitted that the lack of evidence showing premeditation has deprived the Petitioner his liberty without due process of the law.

Even if this Court should find that there is "some" evidence of premeditation in the record, serious doubts have arisen over whether this finding is sufficient to deny the writ of habeas corpus in light of the holding in In re Winship,

397 U.S. 358 (1970). In that case the Court held at p.364 that

> the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

This protection would become meaningless as applied to this case where "some" evidence of premeditation might exist but no rational trier of fact could have found the Petitioner guilty beyond a reasonable doubt of the first degree murder of Mrs. Cole. In this case it is submitted that the Petitioner was convicted of first degree murder solely on the basis of inflammatory photographs.

Evidence introduced for the Commonwealth included several black and white, and one color, photographs of the body of the deceased at the discovery site. The Court, in hearing final arguments from both the Commonwealth and the Defense, began to propound on behalf of a conviction for murder in the first degree. When the defense insisted that intoxication mitigated any specific intent to commit premeditated murder, the Honorable Judge Ernest P. Gates replied, referring to the photographs of the semi-nude body of Mrs. Cole.

> The Court: Did you see the picture of her face and the mutilation? [A.129]
>
> The Court: Take a look at that picture again. To me it is a very horrible looking picture. [A.129].
>
> The Court: Look at the face. [A.129].
>
> The Court: Look where she was shot. [A.130].

The photographs, while not pleasant, could in no way be interpreted as prima facie evidence of premeditation. The autopsy report states that the body was decomposing when found. Rodent and insect marks were visible on the face, hands, arms, shoulders, and right great toe. [A.143]. The "horrible looking picture" noted by Judge Gates obviously referred to the color

photograph taken when the body was turned over from its face-down position. The natural state of decomposition, plus the insect and rodent markings on the face, doubtlessly had an emotional impact upon the Court. The Court extrapolated conclusions from the photographs which were contrary to all the evidence as produced by the coroner's examination.

The mere fact that a judge, rather than a jury, convicted the Petitioner should not change the fact that no rational trier of fact could have found the Petitioner guilty beyond a reasonable doubt of the first degree murder of Mrs. Cole. As such, the Petitioner was denied due process of the law.

The Petitioner urges this Court to adopt the reasoning of Justice Stewart in his dissent to the denial of certiorari in Freeman v. Zahradnick, 429 U.S. 1111, 1112-1113 (1977) when he argued that:

> [i]f, after viewing the evidence in the light most favorable to the State cf. Glasser v. United States, 315 U.S. 60, 80, a federal court determines that no rational trier of fact could have found a defendant guilty beyond a reasonable doubt of the state offense with which he was charged, it is surely arguable that the court must hold, under Winship, that the convicted defendant was denied due process of law.

The Constitution requires that a person is protected against conviction except upon proof beyond a reasonable doubt. If a Court fails to determine whether the evidence is sufficient, it would be abrogating its duty in the case of a Petition for Writ of Habeas Corpus to decide whether the Petitioner's incarceration is in violation of federal constitutional law. It is respectfully submitted that the United States Court of Appeals for the Fourth Circuit failed to do so under the mistaken belief that it could act only if there was no evidence of premeditation. A mistake was made by the Fourth Circuit when it applied the rule of Thompson v. City of Louisville,

supra, when it should have applied the more recent principles of In re Winship, supra.

CONCLUSION

For the above-stated reasons, the Petitioner, James A. Jackson, prays this Court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

Carolyn J. Colville
CAROLYN J. COLVILLE
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UNPUBLISHED

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 77-1205

James A. Jackson,

Appellee,

versus

Commonwealth of Virginia,
and
R. Zahradnick, Warden;
Anthony F. Troy, Attorney
General of Virginia,

Appellants.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge.

Argued October 3, 1977 Decided: August 3, 1978

Before HAYNSWORTH, Chief Judge, WINTER and WIDENER, Circuit Judges

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Linwood T. Wells, Jr., Assistant Attorney General (Anthony F. Troy, Attorney General of Virginia on brief) for Appellant; Carolyn J. Colville (Tracy Dunham, Colville and Dunham on brief) for Appellee.

PER CURIAM:

The district court granted habeas relief to this state prisoner on the ground that his state court conviction of first degree murder was unsupported by any evidence of premeditation. The district court recognized the rule that the due process question does not require an appraisal of the sufficiency of the testimony to support a finding of guilt beyond all reasonable doubt, but that the answer turns upon the presence or absence of "some" evidence to support each element of the offense. The district court concluded there was no evidence to support a finding of premeditation. We take a different view of the facts and reverse.

Jackson had met the victim, Mrs. Cole, when he was confined in a local jail in Virginia and she was a cook in the jail's kitchen. When he was released from jail, she befriended him. Indeed, there were indications that she wished him to move into her home with her, but Jackson arranged to move into the home of her son, Curtis Cole.

Late in the afternoon of the day of the homicide, Mrs. Cole drove her automobile to the home of her son, and Jackson went out of the house to join her in her car. Apparently, the two talked of a trip to North Carolina, for they called Curtis Cole out of the house to ask him if he would go, too. He declined, and indicated that his mother then changed her mind. Curtis Cole left the two talking in the car, and Mrs. Cole called to him shortly to say that she and Jackson were going to a diner.

Both Jackson and Mrs. Cole had been drinking, and Jackson had a .38 caliber revolver with which he had been engaged in target practice earlier in the afternoon. There was a butcher knife belonging to Mrs. Cole on the front seat, but everything seemed amicable between them.

While seated in the diner, they encountered a deputy sheriff who observed the revolver that Jackson was wearing and the fact that he seemed too much under the influence of whiskey to be driving. The deputy asked to be given possession of the revolver until Jackson was sober. Mrs. Cole told him of the butcher knife on the front seat of her car, but

insisted that they were "going straight home," and the deputy contented himself with hastening their departure without taking possession of either the revolver or the knife. As they parted, Jackson told the deputy that he and Mrs. Cole were planning some sexual activity, provoking giggles from Mrs. Cole. According to a statement given by Jackson to police and admitted in evidence at the trial, before driving away from the diner Mrs. Cole told Jackson that she wanted to have sex with him. Jackson said that he refused, whereupon Mrs. Cole attempted to stab him with her knife, saying that if she could not have him no other woman would. Jackson said he pushed her away and hit her on the back of the head with the butt of the revolver. The autopsy report showed a small laceration on the back of her head.

Jackson said he then left the car, crossed the street and called for a taxicab. While waiting for the cab, Mrs. Cole drove up and persuaded him to reenter her car. She then drove to a quiet, secluded church yard. There, according to Jackson, the two began "messing around," and the clothing from the lower portions of Mrs. Cole's body was removed. Standing outside the automobile, according to Jackson, Mrs. Cole

again sought sexual relations, and upon Jackson's declination, she again undertook to attack him with the butcher knife. To warn her away, Jackson said that he fired his revolver into the ground six times, emptying it. He then said that he broke the revolver open, emptying the six shell casings on the ground, which police officers later found, and reloaded his revolver. He said that when the revolver was reloaded, Mrs. Cole sought to wrest the pistol from him, and that during the scuffle the pistol accidentally discharged, killing Mrs. Cole.

Jackson then fled in her car to Fayetteville, North Carolina, leaving Mrs. Cole where she lay, her slacks beneath her body. A young woman attempted to sell Mrs. Cole's automobile, and Jackson went to Florida. Upon his return from Florida to Fayetteville, he was arrested because of the attempted disposition of the automobile. His statement to the policemen was made as he was being transported from Fayetteville, North Carolina back to Chesterfield County, Virginia.

If the trier of fact was bound to accept Jackson's statement of an accidental discharge of the revolver as the two struggled for possession of it, there would be no basis for a finding of premeditation

on his part. Jackson's story is full of internal inconsistency, however. According to his statement, Mrs. Cole stood idly by with a butcher knife in her hand as Jackson ejected the empty shell casings and reloaded his revolver. Only then did she drop the butcher knife and attempt to seize the gun. More significantly, perhaps, she was shot not once but twice. One bullet passed through her left breast from left to right, while the fatal bullet passed through her left chest and back, the spent bullet lodging itself in the interior of Mrs. Cole's automobile. That a single shot might have been fired accidentally may be believable, but that a second was fired accidentally after Mrs. Cole had already been struck once is incredible.

While premeditation is an essential element of the offense of first degree murder, the rule in Virginia is that it need not exist for an appreciable period of time. The requirement is met if the necessary intention exists immediately before the fatal blow is struck.[1] The fact that Jackson reloaded his revolver, the fact that he was so unthreatened by Mrs. Cole that

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1. Hairston v. Commonwealth, 217 Va. 429, 230 S.E.2d 626 (1975); Akers v. Commonwealth, 216 Va. 40, 216 S.E.2d 28 (1975); Shiflett v. Commonwealth, 143 Va. 609, 130 S.E. 777 (1925).

he had sufficient time within which to do it, and the fact that she was shot twice together constitute some evidence of an intention on his part to shoot her.

In Virginia, extreme intoxication may suffice to negate premeditation. There was evidence that Jackson had much to drink, as had Mrs. Cole, but the trier of fact was warranted in finding that Jackson was not so intoxicated as to negate premeditation. The deputy sheriff at the diner thought that Jackson had had too much to drive an automobile, but he did not think Mrs. Cole so intoxicated. Nor did he think Jackson so drunk that he should not be allowed to leave in possession of his weapon.

Whether the judge, to whom the case was tried without a jury, was warranted in finding that there was premeditation beyond a reasonable doubt, we need not consider.[2] One Justice of the Supreme Court has suggested that the rule of Thompson v. City of Louisville, establishing the rule that a federal court in a habeas

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2. Thompson v. City of Louisville, 362 U.S. 199 (1960); Williams v. Peyton, 414 F.2d 776 (4th Cir. 1969). Accord: Freeman v. Slayton, 550 F.2d 909 (4th Cir. 1976), cert. denied sub nom. Freeman v. Zahradnick, 429 U.S. 1111 (1977); Holloway v. Cox, 437 F.2d 412 (4th Cir. 1971); Young v. Boles, 343 F.2d 136 (4th Cir. 1965); Faust v. North Carolina, 307 F.2d 869 (4th Cir. 1962); Grundler v. North Carolina, 283 F.2d 798 (4th Cir. 1960).

proceeding must deny the writ if, in the state court trial, there was "some" evidence to prove each element of the offense, is too narrow in light of In re: Winship, 397 U.S. 358 (1970). See the opinion of Mr. Justice Stewart dissenting from denial of certiorari in Freeman v. Zahradnick, 429 U.S. 1111 (1977). Without greater indication that a majority of the members of the Supreme Court are prepared to extend Thompson v. City of Louisville, however, we are bound by it and do not consider whether the evidence was enough for the finder of fact to find premeditation beyond all reasonable doubt.

Jackson also attempts to attack the finding of guilt of first degree murder on the basis of an indication that the trial judge may have misapprehended the evidence.

Before the body of Mrs. Cole was found, decomposition had begun. A photograph of her body showed the presence of abrasions on portions of her body, but the autopsy report, also in evidence, clearly attributed them to rodents and insects. The judge referred to this photograph shortly before finding Jackson guilty of murder in the first degree and to the fact that she had been shot through her left breast as well as through her body. It is by no means clear, however, that the judge

found or really thought that the abrasions shown in the photograph or the shot through the breast or both proved mutilation of the body by Jackson. Even if it was clear that the finding of premeditation was based in part upon erroneous inferences from some pieces of evidence, the writ shall not be granted as long as there is some evidence to support the ultimate finding of premeditation.[3]

Complaint is also made of the trial judge's consideration of the evidence of intoxication. There was, however, a basis for a finding that Jackson was not so intoxicated as to negate a finding of premeditation, and we have no power to reconsider the bits and pieces of evidence upon which he based his ultimate finding.

Since we conclude that there was no deprivation of any due process right in the finding of guilt of murder in the first degree, we conclude that the district court erroneously ordered the writ to be issued.

This proceeding was begun with a pro se petition which raised a number of questions, some of which were not considered in the district court and are not now considered by us, for, as to them, there has been no exhaustion of state court remedies.

REVERSED.

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3. There is no possible way to review a jury's fact-finding processes. Here, there is only a suggestion that the judge may have been partially misled in his fact-finding process.

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5283

JAMES A. JACKSON,

Petitioner,

—*v.*—

COMMONWEALTH OF VIRGINIA

AND

R. ZAHRADNICK, Warden,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 25, 1978
CERTIORARI GRANTED DECEMBER 4, 1978

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5283

JAMES A. JACKSON,

Petitioner,

—*v.*—

COMMONWEALTH OF VIRGINIA

AND

R. ZAHRADNICK, Warden,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

June 18, 1976—Petitioner's original petition filed in the United States District Court for the Eastern District of Virginia.

June 29, 1976—Respondent's motion to dismiss filed.

July 7, 1976—Petitioner's rebuttal to the motion to dismiss filed.

October 1, 1976—Order entered granting the writ of habeas corpus with a Memorandum filed at the same time.

November 1, 1976—Respondent's notice of appeal filed.

August 3, 1978—Opinion and judgment of the United States Court of Appeals for the Fourth Circuit.

JAMES A. JACKSON
Name

106332
Prison Number

VIRGINIA STATE PENITENTIARY
Place of Confinement

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Case No. 76-0270-R

JAMES A. JACKSON, PETITIONER

vs.

R. ZAHRADNICK, WARDEN
Superintendent, Jailor, or authorized person
having custody of petitioner, RESPONDENT

and

ANDREW P. MILLER
The Attorney General of the
State of Virginia, ADDITIONAL RESPONDENT

(If petitioner is attacking a judgment which imposed a sentence to be served in the *future*, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. § 2255, in the federal court which entered the judgment.)

PETITION—Filed June 18, 1976

1. Name and location of court which entered the judgment of conviction under attack Corporation Court, County of Chesterfield, Chesterfield, Virginia
2. Date of judgment of conviction 27 March 1975

3. Length of sentence Thirty (30) years
4. Nature of offense involved (all counts) Murder, 1st. Degree—1 Count
5. What was your plea? (check one)
   a. Not guilty (X) b. Guilty ( )
   c. Nolo contendere ( )

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

   N/A
6. Kind of trial (check one)
   a. Jury ( ) b. Judge only (X)
7. Did you testify at the trial? Yes ( ) No (X)
8. Did you appeal from the judgment of conviction Yes ( ) No (X)
9. If you did appeal, answer the following:
   a. Name of court Supreme Court of Virginia, Richmond, Virginia
   b. Result Denied 10 February 1976
   c. Date of result 10 February 1976
10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? Yes ( ) No (X)
11. If you answer to 10 was "yes", give the following information
    a. (1) Name of Court N/A
       (2) Nature of proceeding N/A
       (3) Grounds raised N/A
       (4) Did you receive an evidentiary hearing on your petition, application or motion? YES ( ) NO ( ) N/A

(5) Result N/A

(6) Date of result N/A

b. As to any second petition, application or motion, give the same information:

(1) Name of court N/A

(2) Nature of proceeding N/A

(3) Grounds raised N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( ) N/A

(5) Result N/A

(6) Date of result N/A

c. As to any third person, application or motion, give the same information:

(1) Name of court N/A

(2) Nature of proceeding N/A

(3) Grounds raised N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( ) N/A

(5) Result N/A

(6) Date of result N/A

d. Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ( ) No ( ) N/A

(2) Second petition, etc. Yes ( ) No ( ) N/A

(3) Third petition, etc. Yes ( ) No ( ) N/A

e. If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not
N/A

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: In order to proceed in the federal court, you must first exhaust your state court remedies as to each ground on which you request action by the fereral court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

A. Ground one: *The indictment failed to show that the killing and murder was charged to be done with Malice Aforethought, which*

Supporting *FACTS* (tell your story briefly without citing cases or law):

is indispensable. The Commonwealth felt only that a 2nd. Murder Degree was warranted and so states (TR-112). The elements of murder, either 1st. or 2nd. Degree Murder, were not proved and in particular, Malice Aforethought or premeditation.

B. Ground two: *Violation of Constitutional Rights in respect to Fifth, Sixth and Fourteenth Amendments*

Supporting *FACTS* (tell your story briefly without citing cases or law):

Interrogated by police after stating wish to remain silent. Impartiality of presiding judge by interference in trial. Interrogation without having seen counsel. Use of concealed tape recorder without knowledge of accused.

C. Ground three: *Conviction contrary to fact and law and not supported by evidence that Malice or premeditation present.*

Supporting *FACTS* (tell your story briefly without citing cases or law):

Evidence showed crime was of passion since testimony of Deputy Sheriff indicated high alcoholic state, both parties in possession of weapons and planning to engage in a sexual act after departing area

D. Ground four: *Failure of police to both safeguard his rights and to produce evidence in support of his case.*

Supporting *FACTS* (tell your story briefly without citing cases or law):

Police continued interrogation after Accused wished to remain silent, used tape-recorder, coercion, excessive delay in transporting him back to Virginia, and failure to obtain bullets alledegly fire in self-defense and warning to deceased.

FOR YOUR INFORMATION, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. *However, you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

a. Denial of effective assistance of counsel.

b. Denial of right of appeal.

c. Conviction obtained by plea of guilty which was unlawfully induced or entered.

d. Conviction obtained by use of coerced confession.

e. Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

f. Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

g. Conviction obtained by a violation of the privilege against self-incrimination.

APPENDED SHEET

GROUND E. BIAS and Interference by the Presiding judge during the trial.

Support = The presiding judge himself raised the charge to Murder in the 1st. Degree over the Commonwealth and did become personally involved in the case to the degree of making caustic remarks to Defense Counsel regarding photographs of Deceased, alleged mutilation directly aimed at the Accused, failure to release copies of said photographs when requested although he, the presiding judge released copies of the Medical Examiners Reports, denial of a Show Cause Order petition regarding the photographs.

GROUND F. Conviction obtained by use of coerced and illegal statement obtained by police officers by means of a concealed tape-recorder in motor vehicle while being transported from North Carolina to Virginia, a trip that took excessively long to complete to the extent of eight (8) hours approximately.

Support = The police officers did take approximately eight hours to transport Accused to Virginia in a motor vehicle and did interrogate him and promise to help him in his case to prove that a charge of murder was not warranted, which is coercion, since he had signed a statement in North Carolina

he did not wish to sign the Warning of Rights in front of witnesses and did ask for counsel to advise him while in North Carolina, which was denied.

GROUND G. Conviction was obtained through violation of the privilege of self-incrimination.

Support = A statement introduced into the court record and recorded on a tape-recorder concealed in the front seat area of the transporting vehicle unbeknown to Accused who was without counsel was used to his detriment and did place him in jeopardy. Further, after being introduced into evidence, a statement that Accused did fire several shots into the ground between himself and Deceased as a warning after Deceased advanced upon him with the intent to attack him with a butcher knife, and police officers did fail to submit evidence, by means of the spent projectiles, that Accused had indeed fired those warning shots.

GROUND H. Police Officers did fail to produce all evidence available.

Support = The police officers did produce spent cartridges found at the scene of the crime, but did fail to find and produce the spent projectiles claimed to be fired by Accused. The function of the police is to present all evidence of the case regardless whether favorable to prosecution or defense, yet this was not done which therefore hindered the defense and denied evidence vital to them.

GROUND I. Issue by the presiding judge over the number of gunshots.

Support = Enraged and drunk grappling with Accused for gun is unpredictable.

h. Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

i. Conviction obtained by a violation of the protection against double jeopardy.

j. Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.

13. If any of the grounds listed in 12A, B, C and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

Grounds A, B and D, plus those of appended sheet—Counsel did not raise these issues even when directed to do so in either trial or on direct appeal to Supreme Court.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack Yes ( ) No (X)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

a. At preliminary hearing Mack T. Daniel 4401 Old Hundred Road, Chester, Virginia 23831

b. At arraignment and plea Same as A.

c. At trial Same as A.

d. At sentencing Same as A.

e. On appeal Same as A.

f. In any post-conviction proceeding N/A

g. On appeal from any adverse ruling in a post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

    Yes ( ) No (X)

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

    Yes ( ) No (X)

    a. If so, give name and location of court which imposed sentence to be served in the future:

       N/A

    b. And give date and length of sentence to be served in the future

       N/A

    c. Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

       Yes ( ) No ( )

WHEREFORE, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Executed at Richmond, Virginia on 1 June, 1976.

/s/ James Jackson
Signature of Petitioner

FORMA PAUPERIS AFFIDAVIT

(See instructions at beginning of this form).

I hereby apply for leave to proceed with this petition for writ of habeas corpus without prepayment of fees or costs or giving security therefor. In support of my application, I state under oath that the following facts are true:

1. I am the petitioner in said petition, and I believe that I am entitled to redress.
2. I am unable to prepay the costs of said action, or give security therefor, because I have no tangible property or other items of value.
3. I have no assets or funds which could be used to prepay the fees or costs except 37 cents (Write "None" above if you have nothing, otherwise, list your assets.)

/s/ James Jackson
Signature of Petitioner

(Sign only if you seek to proceed without prepayment of fees and costs)

STATE OF VIRGINIA
COUNTY (CITY) OF RICHMOND

I, JAMES A. JACKSON #106332, being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

/s/ James Jackson
Signature of Petitioner
(Required as to each petitioner)

Subscribed and sworn to before me this 4th day of June, 1976.

/s/ Oscar Hardison
Notary Public or other person
authorized to administer an oath

My Commission Expires September 20, 1977.

CERTIFICATE

I hereby certify that the petitioner herein has the sum of $37 cents on account to his credit at the penal institution where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said penal institution:

_____

_____

_____

_____

/s/ Lt. Oscar Hardison
Authorized Officer of
Penal Institution

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 76-0270-R

JAMES A. JACKSON, PETITIONER

v.

COMMONWEALTH OF VIRGINIA, RESPONDENT

MOTION TO DISMISS—Filed June 29, 1976

Now comes the Respondent, by counsel, and moves this Court to dismiss the Petition for a Writ of Habeas Corpus. In support of said Motion, Respondent states as follows:

1. Petitioner is being detained pursuant to a conviction in the Circuit Court of the County of Chesterfield of August 21, 1975, wherein the Petitioner was convicted of first degree murder and sentenced to a term of 30 years.

2. Petitioner is attacking the validity of the aforesaid conviction and alleges as follows:

   (a) That the indictment was defective because it did not allege that the crime was committed with malice aforethought.

   (b) That the evidence was insufficient to show premeditation or malice aforethought.

   (c) That his confession was involuntary.

   (d) That not all the evidence was introduced against him that was available.

3. As to said allegations, Petitioner has failed to exhaust his available State remedies. (Exhibit A, attached).

4. As to said allegations, Petitioner is not entitled to relief in any event.

5. As to the allegation of the Petitioner that the indictment failed to allege malice aforethought, the indictment was in conformity with § 19.2-221, Code of Virginia (1950), as amended. Moreover, the commission of the words, "malice aforethought", is not fatally defective. *Coleman* v. *Smyth*, 166 F.Supp. 934 (E.D. Va. 1958).

6. As to the allegation of Petitioner that the evidence was insufficient for conviction, Petitioner is entitled to relief only if the record is totally devoid of evidentiary support. *Williams* v. *Peyton*, 414 F.2d 776 (4th Cir. 1969). Such is not the case here. The weapon used in the commission of the crime, the apparent viciousness with which it was carried out, the opportunity to withdraw, possession of the weapon long prior to the commission of the crime, the number of shots fired in the commission of the crime, and the opportunity for premeditation, clearly were enough evidence upon which to base a finding of guilt. Although there was some evidence of intoxication, the Petitioner, himself, by his own admission, clearly understood what he was doing. (Tr. 89).

7. As to the allegation of Petitioner that his confession was involuntary, the evidence clearly demonstrates that Petitioner's confession was not involuntary. He was advised of his constitutional rights. (Tr. 86). The Petitioner stated that he understood them. (Tr. 86). Prior to making the confession, the Petitioner was again advised of his rights. (Tr. 88-89). No objection was made to introduction of the confession. Having raised no objection, he would not be entitled to relief. *Estelle* v. *Williams*, No. 74-676, and *Francis* v. *Henderson*, No. 74-5808, both decided by the Supreme Court of the United States on May 3, 1976.

8. As to the allegation of Petitioner that there was not introduced all available evidence against him, there is no constitutional right to have all evidence available introduced against a defendant.

9. Respondent denies each allegation in the Petition which has not been expressly admitted.

10. Respondent further states that these allegations may be fully determined upon a review of the records, and without the necessity of a plenary hearing.

11. Respondent states that arrangements are being made to have transmitted to this Court the original records of Petitioner's conviction.

WHEREFORE, the Respondent prays that this Court review this Motion to Dismiss and thereafter deny and dismiss the Petition.

COMMONWEALTH OF VIRGINIA

By _____
Counsel

Linwood T. Wells, Jr.
Assistant Attorney General
900 Fidelity Building
Richmond, Virginia 23219

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Case Number 76-0270-R

JAMES A. JACKSON, PETITIONER

v.

COMMONWEALTH OF VIRGINIA, RESPONDENT

REBUTTAL TO MOTION TO DISMISS—

Filed July 7, 1976

Now comes the Petitioner before this Honorable Court, without counsel to advise him, and does hereby render his rebuttal to the Commonwealth.

Petitioner contends that Paragraph #1 is correct as per court records.

Petitioner contends that the contentions of the Commonwealth are correct with the exception of Item D, which he will attack further on in the document.

Petitioner contends that he has exhausted his State Remedies in that following his conviction in a circuit court, he duly appealed its decision to the Supreme Court of Virginia and has carried the process of law into the Federal Courts, therefore he is entitled to file accordingly.

Petitioner is entitled to relief if a wrong does exist and such is the case before the bar.

Petitioner states that malice aforethought was not present in the indictment, the warrant or other document presented him, nor did the Commonwealth feel that a charge of First Degree Murder was warranted as evidenced by the transcript.

Petitioner states that the Commonwealth must prove conclusively that malice did in fact exist and that the elements of First degree murder were in fact present, which it did not do.

Petitioner states there is indeed issue to be taken regarding the advising of his Constitutional Rights and

Commonwealth has failed to dislodge the contentions that same were grossly violated.

Petitioner states that all evidence was not obtained and presented to the Court and that same was in fact detrimental to his case and that his counsel did not raise the issue despite his request for same to be raised.

Petitioner states that many of his contentions are not contained within the records of the Court and he will present them and does ask the Commonwealth to explain to the Court how the contentions occurred.

Petitioner moves this Court to dismiss the motion of the Commonwealth.

Petitioner states that the indictment must clearly charge that the killing was done with malice aforethought and that same is indispensable to the indictment. *Commonwealth* v. *Gibson*, 2 Va Cas (4 Va) 70. Further, Malice aforethought is the grand criterion that distinguishes murder from other killings as evidenced by the *M'Whirt's Case* 3 Gratt (44Va) 594. Therefore, without malice, there can be no murder. *Coleman* v. *Commonwealth*, 184 Va. 197, 35 S.E. (2d.) 96. The test of murder is malice and the Commonwealth failed to prove that there was any malice considered toward the deceased by the accused. The Commonwealth failed to show that the accused made any hostile or otherwise intentional intent to harm the deceased with the exception that evidence was introduced showing that parties involved were heavily under the influence of alcoholic beverages, that sexual activities were planned and in the course of those sexual activities under intoxicated conditions, violence arose not of a planned nature. Malice, either express or implied, is an essential element of either first or second degree murder and the Commonwealth failed to prove malice present. *Richardson* v. *Commonwealth*, 128 Va 691, 104 S.E. 788; *Mercer* v. *Commonwealth*, 150 Va. 588, 142 S.E. 369.

The Commonwealth has clearly established that deceased voluntarily picked up the accused at the residence and they went to the public area where they were observed by Deputy Sheriff David Andrews and Officer Buckner (TR-64). Further, no evidence was presented by the

Deputy's statements that any hostility existed, only intoxication and both possessing weapons (TR-66 to 69). Witnesses Curtis and Sally Cole did not state that any hostility or other contrary behavior existed prior to the killing nor was any present when deceased picked up the accused in her car on the eve of the killing. The only dissention testified to was their own feelings regarding their mother and the accused, plus their relationship.

There is no law against a person having a target practicing session nor is there one stating that a person cannot fire a pistol nor carry one with the exception of being concealed. The accused was engaged in target practice prior to the deceased coming into contact with him and Witness Cole stated he fired the pistol with him at targets. This was verified by Witness Salley Cole, his wife. Clearly no hostility was present or they would have interfered when their mother offered him a ride in her car. Further, they would have been in fear themselves if hostility existed and the Commonwealth failed to present any evidence hostility or malice existed.

Deputy Sheriff Andrews stated that he observed them both in an intoxicated condition, he saw and examined the pistol, he was told by the deceased of the knife and he saw the knife in the car and described it as a butcher knife. Yet in spite of all this, he failed to take action because of personal feelings and again, the lack of hostility or malice being evident. He failed to do his duty as evidenced by the chain of events and perhaps the deceased may be alive today if he had not let personal feelings intervene, but the matter here is that he saw no positive reason to arrest or otherwise take into custody either one or both parties because of malice or hostility.

The Commonwealth stated in its motion that the accused is not afforded the Constitutional right to have all available evidence introduced, however, he is contending that evidence favorable to the accused is also not allowed. In the tape presented in written form to the court, accused stated that he fired into the ground attempting to prevent the deceased from stabbing him with the knife. (TR-90) Further the detectives asked him if he were

willing to show them where he fired the warning shots into the ground. (TR-93) He stated that he would show them and stated that there were six shots fired in warning. However, the police failed to produce any evidence regarding these slugs nor did they state that they attempted to locate them. The function of the police is to gather all evidence, not that evidence that is to be used to prosecute with only. The police here were only too willing to obtain evidence to convict him, but not evidence that would help him or reduce the severity of the crime. This is constitutional denial of evidence pertinent to the defense. Further, accused stated that he did not take items of deceased and that they were in the car, therefore, since the deceased was out of the car, the knife would have been present near the body or in the general area but again no mention is made of the knife yet testimony puts the deceased in the possession of a knife as stated by Deputy Andrews. Vital evidence pertinent to the defense has been allowed to disappear or was not used or not introduced in court and this was detrimental to the accused.

Commonwealth in Paragraph Six states that apparent viciousness existed, but he used the word apparent since the Commonwealth could not prove that malice existed. In addition, he refers to the weapon long before the commission of the crime, but the accused was in a lawful pursuit when in engaged in target practice with Curtis Cole. Again no malice existed or Curtis Cole would have disarmed the accused and failing in that, would have notified the police that accused was acting in a hostile manner and was in possession of a weapon; ie: a pistol. This did not occur. Commonwealth again refers to the number of shots fired in attempt to increase the severity of the act, yet he does not state that several were fired in warning to prevent serious injury when the deceased attacked the accused with the knife. Further, he states that there was some evidence of intoxication, when in fact there was considerable evidence showing great intoxication was in fact present from Curtis and Sally Cole, Deputy Andrews, the accused and the autopsy report on the deceased. The Commonwealth states that he

knew what he, the accused, was doing or that he was intoxicated (TR-89) when in fact it shows nothing of the sort.

Commonwealth states that accused was advised of his Constitutional rights and to this accused agrees, however, the paper containing these rights was not signed by the accused. The entry in the signature area was made by a detective. Further, accused did not want to make a statement and asked for counsel while still in Fayetteville, North Carolina, but same was not provided for him. By asking for counsel and not wishing to make a statement, the detectives were not privileged to continue any form of interrogation of the accused until he had been provided counsel and had consulted with him. As can be clearly seen, the interrogation did not stop and subtle and soft interrogation tactics were used to get him to talk, not know that a tape recorder was being utilized on the front seat recording everything he said and that it would be used in a court of law. The accused was incustodial interrogation status from the moment he entered the car to be transported to Virginia, that he would be unable to have counsel to advise him and that he would be completely at the mercy of the interrogating officers during the trip from Fayetteville, North Carolina to Petersburg, Virginia.

In respect to the tape, it is procedure that the interrogating officers identify themselves, the person they are interrogating and to begin the interrogation and the taping by again warning the accused of his rights. The tape heard in court and the written text from the tape do not show this entry whatsoever. It starts out without any warning or statement that the conversation is being recorded and that the accused is voluntarily making the statement recorded of his own free will and knowledge. Therefore the credibility of the tape and its use as presenting evidence willingly given, is highly doubtful and its color should in fact be carefully considered in light of certain elements which taint its value as evidence.

The Commonwealth is asked specifically why the trip from Fayetteville, North Carolina to Petersburg, Virginia took almost eight (8) hours? Since the entire

state of North Carolina can be traversed in three (3) hours and another hour to Petersburg, why an additional four (4) hours involved? Further, since the route of travel was made on Interstate #95, there would be no delays since there are adequate lanes of travel on this highway. Additionally, the highway would not have to be left since adequate gassing facilities exist on or quite near the highway. It is quite clear that the police officers transported their prisoner at a slow rate of speed in order to subject him to a continual and subtle interrogation without the benefit of counsel and to prevent the accused from obtaining counsel while they were in the process of breaking down any objections and resistance the accused might have had. This is clearly continuing the interrogation and after the accused has specifically stated that he did not wish to make a statement, that he wished to have counsel and he refused to sign the paper in respect to his constitutional rights. Petitioner contends that this was clearly a violation of the Miranda Rule established in *Miranda* v. *Arizona* which prohibits same. The use of the tape recorder without the accused being aware of same concealed on the front seat and used without his knowledge is a clear violation of his constitutional rights under the Fifth Amendment which prohibits same.

Petitioner wishes here to state that he completed only the fifth grade in school and that he is sorely lacking in education and must rely on others to prepare his legal documentation for this Court. Further, his lack of education is very apparent and attempts to confuse or the use of subtle influence is readily workable. In this capacity wihout counsel to advise him, the detectives by delaying their arrival in Petersburg, Virginia were more than able to coerce a statement from the accused by their use of subtle interrogation and their promises to aid him in not being prosecuted on a charge of murder. Petitioner realized that he would have to face some sort of punishment for the death of the deceased that occurred while both were greatly intoxicated and involving sexual activity and would have readily plead guilty to a charge of manslaughter, however, he feels that a charge of

murder is not warranted in as he exercised no malice toward the deceased and the elements were not proven to warrant a conviction on a charge of murder and that his constitutional rights were so violated.

The deceased and the accused arrived at the church which was the death scene only after an altercation outside the diner. The deceased herself came back to the accused to make amends and offer him a ride. In this area, accused stated that he made a telephone call for a cab, but the police officers did not state whether they had checked into the veracity of this statement. Had they checked into this statement, this would have given the accused extra strength in reducing the severity of the act in as much as he attempted to depart the scene of the diner without the deceased. Again, the police saw fit only to gather evidence that would convict the accused and completely negate any mitigating evidence that would aid the accused in his defense.

The death scene was in an isolated place that was reached by the deceased driving her car and bringing the accused with her. Here we have a situation where two people are or were contemplating sexual activity at one point and a change of mood occurred. The entire nature of the situation is sorely aggravated by both parties being heavily under the influence of alcohol and heated words evolved, perhaps a slur on the sexual qualities or capacity of the deceased. Even the accused cannot remember exactly what ignited the chain of events, but he stated that she wished to engage in sexual relations and he did not. Deceased in taking offense with this attacked him with a knife and he attempted to dissuade her by firing the shots into the ground, a total of six bullets, while the deceased was attempting to reach and strike him with the knife. While reloading the weapon, he states that she threw the knife on the ground and then she attacked him physically trying to obtain possession of the pistol. In the struggle for the weapon, the weapon discharged twice. The first shot had to strike the deceased in the breast, since the struggle continued since the gun was discharged a second time. The wound in the breast would only infuriate due to the rage and

intoxication that had existed prior to and during the struggle as evidenced by the knife attack. The wound through the body was the death wound. Clearly the act occurred under the heat of passion and not through malice.

The presiding Judge Gates became impartial in reviewing the photographs of the deceased and especially the face of the deceased. He stated the evidence of mutiliation when in fact the mutilation was the result of insects and rodents as recorded by the autopsy report. This unfair and unjust accusation resulted in His Honor losing his impartiality in the case and His Honor himself increased the act from Second to First Degree murder over the protests of the Commonwealth (TR-112 to 116) His Honor became biased at some point during the trial and this became evident at the trial's conclusion. It is more than possible that His Honor knew the deceased through the jail or some inspection of the jail, but the duty of a trial judge is to remain impartial and to hear the evidence submitted to the bar and analyze the material and render a verdict. By losing his impartially and becoming biased, his judgment was affected and prejudice arose. Further, His Honor released all documentation regarding the case except the picture that had inflamed him, even in the face of a Show Cause order followed by a Writ of Mandamus which is pending. This cast considerable doubt on the impartiality of His Honor even at this date and stage of the case as to prohibit certain evidence and allow other evidence and documentation to be released to the accused knowing that the accused would file a Habeas Corpus.

Further, the term of Malice Aforethought does imply that a mind is under the sway of reason, whereas, passion, while it does not imply a dethronement of reason, yet it is the furor brevis which renders a man deaf to the voice of reason so that, although the act done was intentional of death, it was not the result of malignity of heart, but imputable to human infirmity. Passion and malice are, therefore, inconsistent motive powers and, hence, an act which proceeds from the one cannot

also proceed from the other. *Brown* v. *Commonwealth*, 86 Va. 466, 10 S.E. 745.

Petitioner contends that his Constitutional Rights were violated by the investigating police officers, that he was subjected to subtle coercion by the use of his lack of education, that a tape recorder was utilized without his knowledge or consent, that the act occurred while in a high state of intoxication, that malice did not in fact exist in any form and therefore he has been unjustly punished in regards to impartiality of the Honorable Judge Gates and the severity of the sentence.

Petitioner asks that a hearing be given him before his peers and with the advice of counsel to assist him to expound and expand the contentions and allegations within this petition and due to his lack of education to fully understand the entire legal process since his attorney coached him during the appearances in circuit court to compensate for his lack of understanding and education, and does hereby request that This Honorable Court please appoint him an attorney to assist him in his case.

Whereas, Petitioner moves this Court to discount the Motion to Dismiss by the Commonwealth and to hear his case with proper counsel and trial or hearing with a jury of his peers if the Court should decide to hear the case or to dismiss the charge forthwith based on the Constitutional violations, failure of the police to introduce all evidence and the impartiality of Judge Gates, and such other relief as the Court may deem fit and proper.

/s/ Jackson James
Signature of Petitioner

[Jurat Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action 76-0270-R
76-0267-R

Magistrate No.: 76-0106-L

JAMES A. JACKSON

v.

R. ZAHRADNICK, Warden, et al.

MEMORANDUM—Filed October 1, 1976

Petitioner, a State prisoner, filed this petition for a Writ of Habeas Corpus on 18 June 1976, attacking his conviction for first degree murder. He alleged that the indictment upon which he was tried was faulty in that it failed to allege "malice aforethought." He also alleged that his confession was involuntary and that the Commonwealth failed to produce evidence in his favor. However, because he has failed to exhaust his State remedies on those issues, the Court will not consider them at this time. *Slayton* v. *Smith*, 404 U.S. 53 (1971).

Of more importance is the allegation that there was a complete lack of evidence to show premeditation which was required for a conviction of murder in the first degree. While it is true that petitioner is entitled to relief only if the record is totally devoid of evidentiary support, see *Williams* v. *Peyton*, 414 F.2d 776 (4th Cir. 1969), the Court is of the opinion that such is the case here with respect to premeditation.

A review of the transcript of the proceedings in the Circuit Court shows that petitioner and the victim had been drinking on the day of the homicide. They visited a restaurant in Chesterfield County where they met a deputy sheriff who testified that petitioner was so drunk that he would not let him drive. There was no evidence

that petitioner displayed antagonism toward the victim at that time and, in fact, the deputy testified that when she was leaving, the victim "smiled" and "just laughed" when petitioner intimated that they might engage in sexual activity. Apparently, the deputy was the last person to see the victim alive or to see the petitioner until his arrest in North Carolina.

Petitioner made a statement to the arresting officers to the effect that the victim became belligerent towards him when he refused to have sex with her. Petitioner stated that the victim became so angry that she started at him with a butcher knife. He then fired six shots from a revolver he was carrying into the ground in front of her, but she kept coming. He reloaded the pistol, a scuffle ensued, and the weapon discharged. (Only once according to petitioner's statement although the autopsy showed that two bullets struck the victim.) Thereafter petitioner fled to North Carolina. Although he stated he was not drunk at the time of the incident, all of the evidence is to the contrary.

Black and white photographs of the crime scene were introduced into evidence showing the victim lying face down in a church parking lot. A color photograph was also introduced showing a close-up of the victim after she had been turned face up. In addition, an autopsy report was introduced which made no mention of any bruises or lacerations other than one over the posterior scalp. The autopsy report mentioned numerous abrasions caused by rodents and insects. The lab report indicated that the victim had been shot at close range. (Approximately ½ inch).

At the close of the case, the attorney for the Commonwealth argued for a second degree murder conviction stating that because of the drinking he did not feel first degree murder had been proved. The trial judge thereupon referred to the color photograph and found "malice" from the "bruises" on the body and the gunshot wounds. There is no evidence that the discolorations depicted in the color photograph on the body of the victim are bruises. The autopsy report noted that the body had begun to decompose but it makes no mention

of any contusions except at the bullet entrance and exit sites. The mere fact that the victim was shot is not evidence of premeditation.

Under State law murder in the first degree requires that the killing be deliberate, willful, premeditated and with malice aforethought. See e.g. *Painter* v. *Commonwealth*, 210 VA 360, 171 SE 2nd 166 (1969). Since the Court has concluded that the record is totally devoid of any evidence of premeditation, the petitioner will be granted a Writ of Habeas Corpus with leave to the Commonwealth to retry him within sixty days from the date hereof.

An appropriate order shall issue.

/s/ [Illegible]
United States District Judge

Date: 1 October 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action 76-0270-R
76-0267-R

Magistrate No.: 76-0106-L

JAMES A. JACKSON

v.

R. ZAHRADNICK, Warden, et al.

ORDER—Filed October 1, 1976

In accordance with the memorandum this day filed, and deeming it just and proper so to do, it is hereby ADJUDGED and ORDERED that a Writ of Habeas Corpus shall issue, with leave to the Commonwealth to retain petitioner and to retry him at a trial to commence within sixty (60) days from the entry of this order, otherwise to release him from custody under the sentence imposed.

Let the Clerk send a copy of this order, along with the memorandum, to the petitioner and to the Attorney General of Virginia.

/s/ [Illegible]
United States District Judge

Date: 1 October 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 76-0270-R
76-0267-R

Magistrate No. 76-0106-L

JAMES A. JACKSON, PETITIONER

v.

R. ZAHRADNICK, Warden, et al., RESPONDENTS

NOTICE OF APPEAL—Filed November 1, 1976

Notice is hereby given that Respondents hereby appeal to the United States Court of Appeals for the Fourth Circuit from the final order of this Court entered in this action on October 1, 1976.

R. ZAHRADNICK, Warden, et al.
By /s/ R. Zahradnick
Counsel

Linwood T. Wells, Jr.
Assistant Attorney General
900 Fidelity Building
Richmond, Virginia 23219

[Certificate of Service Omitted in Printing]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1205

JAMES A. JACKSON, APPELLEE

versus

COMMONWEALTH OF VIRGINIA, AND R. ZAHRADNICK, Warden; ANTHONY F. TROY, Attorney General of Virginia, APPELLANTS

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge.

Argued October 3, 1977 Decided: August 3, 1978

Before HAYNESWORTH, Chief Judge, WINTER and WIDENER, Circuit Judges

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Linwood T. Wells, Jr., Assistant Attorney General (Anthony F. Troy, Attorney General of Virginia on brief) for Appellant; Carolyn J. Colville (Tracy Dunham, Colville and Dunham on brief) for Appellee.

PER CURIAM:

The district court granted habeas relief to this state prisoner on the ground that his state court conviction of first degree murder was unsupported by any evidence of premeditation. The district court recognized the rule

that the due process question does not require an appraisal of the sufficiency of the testimony to support a finding of guilt beyond all reasonable doubt, but that the answer turns upon the presence or absence of "some" evidence to support each element of the offense. The district court concluded there was no evidence to support a finding of premeditation. We take a different view of the facts and reverse.

Jackson had met the victim, Mrs. Cole, when he was confined in a local jail in Virginia and she was a cook in the jail's kitchen. When he was released from jail, she befriended him. Indeed, there were indications that she wished him to move into her home with her, but Jackson arranged to move into the home of her son, Curtis Cole.

Late in the afternoon of the day of the homicide, Mrs. Cole drove her automobile to the home of her son, and Jackson went out of the house to join her in her car. Apparently, the two talked of a trip to North Carolina, for they called Curtis Cole out of the house to ask him if he would go, too. He declined, and indicated that his mother then changed her mind. Curtis Cole left the two talking in the car, and Mrs. Cole called to him shortly to say that she and Jackson were going to a diner.

Both Jackson and Mrs. Cole had been drinking, and Jackson had a .38 caliber revolver with which he had been engaged in target practice earlier in the afternoon. There was a butcher knife belonging to Mrs. Cole on the front seat, but everything seemed amicable between them.

While seated in the diner, they encountered a deputy sheriff who observed the revolver that Jackson was wearing and the fact that he seemed too much under the influence of whiskey to be driving. The deputy asked to be given possession of the revolver until Jackson was sober. Mrs. Cole told him of the butcher knife on the front seat of her car, but insisted that they were "going straight home," and the deputy contented himself with hastening their departure without taking possession of either the revolver or the knife. As they parted, Jackson told the deputy that he and Mrs. Cole were planning

some sexual activity, provoking giggles from Mrs. Cole. According to a statement given by Jackson to police and admitted in evidence at the trial, before driving away from the diner Mrs. Cole told Jackson that she wanted to have sex with him. Jackson said that he refused, whereupon Mrs. Cole attempted to stab him with her knife, saying that if she could not have him no other woman would. Jackson said he pushed her away and hit her on the back of the head with the butt of the revolver. The autopsy report showed a small laceration on the back of her head.

Jackson said he then left the car, crossed the street and called for a taxicab. While waiting for the cab, Mrs. Cole drove up and persuaded him to reenter her car. She then drove to a quiet, secluded church yard. There, according to Jackson, the two began "messing around," and the clothing from the lower portions of Mrs. Cole's body was removed. Standing outside the automobile, according to Jackson, Mrs. Cole again sought sexual relations, and upon Jackson's declination, she again undertook to attack him with the butcher knife. To warn her away, Jackson said that he fired his revolver into the ground six times, emptying it. He then said that he broke the revolver open, emptying the six shell casings on the ground, which police officers later found, and reloaded his revolver. He said that when the revolver was reloaded, Mrs. Cole sought to wrest the pistol from him, and that during the scuffle the pistol accidentally discharged, killing Mrs. Cole.

Jackson then fled in her car to Fayetteville, North Carolina, leaving Mrs. Cole where she lay, her slacks beneath her body. A young woman attempted to sell Mrs. Cole's automobile, and Jackson went to Florida. Upon his return from Florida to Fayetteville, he was arrested because of the attempted disposition of the automobile. His statement to the policemen was made as he was being transported from Fayetteville, North Carolina back to Chesterfield County, Virginia.

If the trier of fact was bound to accept Jackson's statement of an accidental discharge of the revolver as the two struggled for posssesion of it, there would be no

basis for a finding of premeditation on his part. Jackson's story is full of internal inconsistency, however. According to his statement, Mrs. Cole stood idly by with a butcher knife in her hand as Jackson ejected the empty shell casings and reloaded his revolver. Only then did she drop the butcher knife and attempt to seize the gun. More significantly, perhaps, she was shot not once but twice. One bullet passed through her left breast from left to right, while the fatal bullet passed through her left chest and back, the spent bullet lodging itself in the interior of Mrs. Cole's automobile. That a single shot might have been fired accidentally may be believable, but that a second was fired accidentally after Mrs. Cole had already been struck once is incredible.

While premeditation is an essential element of the offense of first degree murder, the rule in Virginia is that it need not exist for an appreciable period of time. The requirement is met if the necessary intention exists immediately before the fatal blow is struck.[1] The fact that Jackson reloaded his revolver, the fact that he was so unthreatened by Mrs. Cole that he had sufficient time within which to do it, and the fact that she was shot twice together constitute some evidence of an intention on his part to shoot her.

In Virginia, extreme intoxication may suffice to negate premeditation. There was evidence that Jackson had much to drink, as had Mrs. Cole, but the trier of fact was warranted in finding that Jackson was not so intoxicated as to negate premeditation. The deputy sheriff at the diner thought that Jackson had had too much to drive an automobile, but he did not think Mrs. Cole so intoxicated. Nor did he think Jackson so drunk that he should not be allowed to leave in possession of his weapon.

Whether the judge, to whom the case was tried without a jury, was warranted in finding that there was premeditation beyond a reasonable doubt, we need not

[1] *Hairston* v. *Commonwealth*, 217 Va. 429, 230 S.E.2d 626 (1975); *Akers* v. *Commonwealth*, 216 Va. 40, 216 S.E.2d 28 (1975); *Shiflett* v. *Commonwealth*, 143 Va. 609, 130 S.E. 777 (1925).

consider.[2] One Justice of the Supreme Court has suggested that the rule of *Thompson* v. *City of Louisville*, establishing the rule that a federal court in a habeas proceeding must deny the writ if, in the state court trial, there was "some" evidence to prove each element of the offense, is too narrow in light of *In re: Winship*, 397 U.S. 358 (1970). *See* the opinion of Mr. Justice Stewart dissenting from denial of certiorari in *Freeman* v. *Zahradnick*, 429 U.S. 1111 (1977). Without greater indication that a majority of the members of the Supreme Court are prepared to extend *Thompson* v. *City of Louisville*, however, we are bound by it and do not consider whether the evidence was enough for the finder of fact to find premeditation beyond all reasonable doubt.

Jackson also attempts to attack the finding of guilt of first degree murder on the basis of an indication that the trial judge may have misapprehended the evidence.

Before the body of Mrs. Cole was found, decomposition had begun. A photograph of her body showed the presence of abrasions on portions of her body, but the autopsy report, also in evidence, clearly attributed them to rodents and insects. The judge referred to this photograph shortly before finding Jackson guilty of murder in the first degree and to the fact that she had been shot through her left breast as well as through her body. It is by no means clear, however, that the judge found or really thought that the abrasions shown in the photograph or the shot through the breast or both proved mutilation of the body by Jackson. Even if it was clear that the finding of premeditation was based in part upon erroneous inferences from some pieces of evidence, the

[2] *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960); *Williams* v. *Peyton*, 414 F.2d 776 (4th Cir. 1969). *Accord: Freeman* v. *Slayton*, 550 F.2d 909 (4th Cir. 1976), *cert. denied sub nom. Freeman* v. *Zahradnick*, 429 U.S. 1111 (1977); *Holloway* v. *Cox*, 437 F.2d 412 (4th Cir. 1971); *Young* v. *Boles*, 343 F.2d 136 (4th Cir. 1965); *Faust* v. *North Carolina*, 307 F.2d 869 (4th Cir. 1962); *Grundler* v. *North Carolina*, 283 F.2d 798 (4th Cir. 1960).

writ shall not be granted as long as there is some evidence to support the ultimate finding of premeditation.[3]

Complaint is also made of the trial judge's consideration of the evidence of intoxication. There was, however, a basis for a finding that Jackson was not so intoxicated as to negate a finding of premeditation, and we have no power to reconsider the bits and pieces of evidence upon which he based his ultimate finding.

Since we conclude that there was no deprivation of any due process right in the finding of guilt of murder in the first degree, we conclude that the district court erroneously ordered the writ to be issued.

This proceeding was begun with a *pro se* petition which raised a number of questions, some of which were not considered in the district court and are not now considered by us, for, as to them, there has been no exhaustion of state court remedies.

REVERSED.

[3] There is no possible way to review a jury's fact-finding processes. Here, there is only a suggestion that the judge may have been partially misled in his fact-finding process.

IN THE CIRCUIT COURT OF THE
COUNTY OF CHESTERFIELD

COMMONWEALTH OF VIRGINIA

v.

JAMES A. JACKSON

TRANSCRIPT OF PROCEEDINGS—March 27, 1975

TESTIMONY OF GLORIA FARMER

[9] *GLORIA FARMER*, introduced on behalf of the Commonwealth, having been previously duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RUDY:

Q. State your name and address?
A. Gloria Farmer and I am a waitress.
Q. Where do you work?
A. Chesterfield County Diner.

* * * *

[10] Q. Were you related to the deceased in this case, Mary Houston Cole?
A. Yes, I was.
Q. What relationship were you to her?
A. Daughter.

* * * *

Q. Now, directing your attention to the 24th day of August, 1974, I believe that was a Saturday, will you tell the court if you had an occasion to see your mother on that day?
A. Yes, I did.
Q. What were the circumstances under which you saw her?
A. Well, I was there when she got home [11] from work.

Q. You were at her house?
A. Yes, I was.

* * * *

[12] Q. What happened when she got home?
A. Well, she came in and she asked me if I was going to the grocery store and I told her, I just didn't feel like, I didn't want to go. And as far as I remember she, my sister-in-law had called while we were there and asked something about canning some snaps or something. I think she decided that she was going to the grocery store but not A&P. She was going to By-Rite.

* * * *

Q. Now, did she leave the house?
A. Yes, to go to the grocery store.
Q. Did she return?
A. Yes.
Q. How much later after that did she return?
[13] A. She was gone about an hour or an hour and a half maybe.
Q. When she returned did she have any groceries with her?
A. Yes.
Q. What happened after that when she returned?
A. She got the food put away and she started fixing supper. She asked me if I, I don't know, she had a telephone call before she started. No, she started fixing supper and had a telephone call.
Q. Did you hear any telephone calls?
A. No, I didn't pay that much attention.
Q. All right now, would you state whether or not during this time she had anything to drink?
A. She—I think she was drinking a beer. She brought a six pack back from the store.
Q. She brought a six pack from the store?
A. Yes.
Q. Now, you said she started cooking supper and then what did you do?
A. I watched the supper while she took a bath.
Q. Did she take a bath or go into the bathroom?
[14] A. Yes.

Q. Did she take anything in the bathroom with her?
A. She took the beer with her.

* * * *

Q. All right now, prior to this time, which is the 24th of August, when was the approximate time [15] that you had seen this man? The first time?
A. Right after he got out of jail. And they went over and down and picked him up and brought him out to mother's.
Q. Who went over to town to pick him up?
A. My husband and my brother and mama.
Q. Your mother?
A. Yes.
Q. Whose idea was it to go to town to pick him up, do you know?
A. I don't know. They called out and she called, I believe he called out there if—
Q. He called to your mother's?
A. Yes.
Q. And somebody went to pick him up from somewhere, is that right?
A. Right.
Q. That was approximately how long before this day?
A. I can't say for sure.
Q. Well, two weeks or a month or thirty days or just give us an approximation?
A. It had been more than thirty days.
Q. A little more than thirty days?
A. Yes.
[16] Q. Much more than thirty days?
A. I can't say exactly because right after he got out of jail—
Q. —okay. So whenever he got out of jail that's when they went and picked him up?
A. Yeah.
Q. Did you see him when they got back from picking him up?
A. Yes.
Q. Did they come—where did you see him?
A. They came back to my mother's house.

Q. To your mother's house?
A. Yes.
Q. That would have been he and your mother and sister and—
A. No.
Q. Your brother-in-law?
A. No.
Q. Or your brother—
A. And my husband.
Q. Well, what happened when they came back?
A. Well, they came back and she came over and tried to introduce him and I said I didn't want to meet him and I wanted to go home.
[17] Q. Did you go home?
A. No.
Q. What did you do?
A. They had something to drink and they were all drinking then.
Q. Does that mean you had a little something?
A. No, I didn't drink nothing, nothing.
Q. What happened then?
A. They were all just in the house then.
Q. Did you stay there?
A. Till a little later on that evening then we left.
Q. Was that the first time that you had ever seen this man, is that right?
A. Right.
Q. Now, did you see him subsequent to that time? After that time?
A. I seen him a couple of time up in the yard.
Q. Up in whose yard?
A. Mother's yard and once when I went down to my sister's they were coming in in a truck.
Q. You saw him a couple of times in your mother's yard and once in your sister's yard?
[18] A. Yes, and one of my, at my brother's. Once there.

* * * *

[20] CROSS-EXAMINATION

BY MR. DANIELS:

Q. Mrs. Farmer, what was your mother's condition when she first arrived?
A. From work?
Q. Yes?
A. She was just like she always was, she had not drank nothing. She was just tired.
Q. Then she went to the store?
A. Yes, about a half hour after she got home.
Q. What was her condition when she got back, had she been drinking anything?
A. No, she didn't open up a beer until she [21] got back home.
Q. When she left and said she might be going to North Carolina how many beers had she consumed?
A. I think maybe two or three cans.
Q. Did she take any with her that you know of?
A. I do not remember whether she took it or, I don't remember whether she took it or left it. For a fact I don't remember.

* * * *

TESTIMONY OF SALLY COLE

[25] *SALLY COLE*, introduced on behalf of the Commonwealth, having been previously duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RUDY:

Q. Mrs. Cole, will you state your full name and where you live?
A. Sally Mae Cole. I live at 6301 Newby's Bridge Road.

* * * *

Q. Are you related to the deceased Mary Houston Cole?
A. Daughter-in-law.

Q. You're married to her son?
A. Yes.

* * * *

[32]

BY MR. RUDY:

Q. Now, directing your attention to the day, to the last day that you saw your mother-in-law, describe to the court if you will, what happened at your house that day relative to this defendant and relative to your mother-in-law?
A. She, I saw her come up in the yard and—
Q. What time was this?
A. It was about five-thirty or six o'clock.
Q. Five-thirty or six?
A. Yes.
Q. Now, had you been home with this defendant James A. Jackson, earlier that day?
A. Yes, sir.
Q. What had you all been doing?
A. Nothing, no more than what I always do, clean up.
Q. Well, do you know whether or not he had a pistol?
A. Yes, sir.
Q. Do you know whether or not he fired [33] that pistol on that day?
A. Pistol—um—the children said that he fired it while—

* * * *

BY MR. RUDY:

Q. Did you ever see him?
A. He did fire it after I came back from the grocery store.
Q. Did you see him fire it?
A. I was in the kitchen and my husband and him were out there shooting.
Q. You could see them from the kitchen?
A. Yes.

Q. You saw them shooting, what were they shooting at if you remember?

A. They were standing on the back porch shooting down at some bottles. They had a bottle or botties sitting up down on this tree stump.

Q. Ma'am?

A. They had some bottles and cans and something sitting on a tree stump.

Q. Now, had James Jackson been drinking or [34] your husband drinking that day?

A. Yes.

Q. How much would you say James Jackson had been drinking?

A. I don't know but he had been drinking a lot.

Q. He had been drinking a lot?

A. Um-hum.

Q. Do you know whether he was drinking out of one of the bottles or several bottles?

A. He had several bottles and I don't know if he drank just one or several. I know he was drinking.

Q. How long? When had he started drinking on that day?

A. That morning.

Q. He started drinking that morning?

A. Um-hum.

Q. Yes?

A. Yes.

Q. Was your husband home most of the time on Saturdays or on this particular Saturday?

A. Yes, he was home all day except when he went to the grocery store.

Q. He and this defendant were together most of the time?

[35] A. Except when he went to the grocery store with me.

Q. Your husband went to the grocery store with you?

A. Yes.

Q. When did he do this shooting, was it the morning or afternoon or when was it done?

A. In the afternoon.

Q. How long before your mother-in-law came?

A. It was a good while before they came over.

Q. A good while?

A. Yes.

Q. It would have been early afternoon, would that be a fair statement?

A. Yes.

Q. To your knowledge had anybody else ever shot a pistol over there?

A. No, sir.

* * * *

[36] Q. Now, do you know whether this defendant had had any conversation with your mother-in-law on that particular day?

A. All I know is that he had seen her up at the Bi-Rite supermarket.

MR. DANIELS: Objection.

BY MR. RUDY:

Q. How do you know that?

A. He told me.

Q. He told you he had seen her at the Bi-Rite?

A. Yes.

Q. When would that have been Sally?

A. I would say a couple of hours before she came over.

[37] Q. Did you see him leaving to go to the Bi-Rite or did you know that he was going?

A. Yes.

Q. Did he go with anybody?

A. My husband took him up there.

Q. And he told you he had seen your mother-in-law at the Bi-Rite?

A. Yes, sir.

Q. Now, when he came back from the Bi-Rite did he have—why did he go to the Bi-Rite, do you know or did he say why he was going up there?

A. To get some beer.

Q. Get beer?

A. Yes.

Q. Did he have some beer when he came back?
A. Yes.
Q. How many beers did he have?
A. A couple of, two six packs.
Q. Two six packs?
A. Yes.
Q. Now, then the next thing you recall was when your mother-in-law came over there, is that correct?
A. Yes, sir.
Q. Describe to the court what happened next?
[38] A. He went out of the house and got in the car with her and she never did come in the house. And they sat out there in the car for a long time and then they left and she said she was going to the store. She said she'd be right back.
Q. They left in the car?
A. Yes, sir.
Q. Were you there when she and he were having this conversation or were you going about your business elsewhere?
A. I was still in the kitchen but I was watching them.
Q. You were watching them but you could not hear?
A. I heard her when she said she was going to the store and she had, she talked to my husband.
Q. Do you know whether or not your mother-in-law had anything to drink with her at that time?
A. With her?
Q. Yes? Your mother-in-law?
A. I seen a beer can sitting up on the dash of the car but I don't know if she was drinking out of it or not.
Q. Now, describe your mother-in-law's [39] actions and the defendant's actions when they left? Did they leave together in her car?
A. Yes, sir.
Q. Was she driving?
A. Yes, sir.
Q. Did you hear any argument between them at all prior to that time?
A. No.

Q. You did not?
A. No, sir.
Q. Then they left?
A. Um-hum. Yeah.
Q. Was that the last time you saw her?
A. Yes.
Q. What time was that, approximately?
A. She left a little after seven when they left from over there.

* * * *

TESTIMONY OF CURTIS COLE
[47] DIRECT EXAMINATION

BY MR. RUDY:

Q. Curtis, state your name and occupation and where you live?
A. Curtis Cole, Curtis William Cole. I was working as a bricklayer and I live at my father's now.

* * * *

[52] Q. Directing your attention to this day, the last time you saw your mother which was a Saturday I believe—
A. —Yes.
Q. Did you spend some time with this defendant that day?
A. Yes.
Q. Tell the judge what you all did that day?
A. Well, he got me to carry him to the store and I carried him to the Bi-Rite.
Q. That was in the afternoon?
A. Yes, sir.
Q. How about earlier that day?
[53] A. No, I was outside cutting grass.
Q. How much grass do you have to cut Curtis?
A. Well, between the grass and the weeds and the bushes I was cutting—
Q. Would you say an acre?
A. A right good yard, cleaning up too.
Q. Now, did he have his pistol?
A. Yes.

Q. Would you recognize the pistol if you saw it again?
A. Yes, sir.
Q. How could you recognize it?
A. Yes, sir.
Q. How could you recognize it?
A. I know it if I seen it.
Q. I show you this pistol here and ask if you have seen it or if that's the pistol that looks familiar to you? Does it? (Handing the witness a pistol)
A. Yes, sir.
Q. Now, what are you looking at or by looking at it what would make you think that it looks familiar?
A. The way it opens up right there.
Q. All right. Did you ever have an occasion to use that pistol?
A. Yes, I shot it.
Q. When did you shoot it Curtis?
[54] A. I don't know what day that was.

MR. RUDY: I'd introduce the pistol as Commonwealth's Exhibit 1.

THE COURT: It will be received by the court as Commonwealth's Exhibit 1.

NOTE: Commonwealth's Exhibit Number 1 is entered into evidence.

WITNESS COLE: I shot it the night he brought it home.

BY MR. RUDY:

Q. Did you shoot it any this day that was the last day you saw your mother, do you remember taking target practice and shooting it any?
A. No, sir. I did not shoot it that day.
Q. Was he shooting it?
A. My wife said he was shooting it.
Q. You did not see him shoot it?
A. No, sir.
Q. When did you all shoot it together, did you shoot it together with him?
A. Yes.

Q. When would you all shoot it together or where were you when you shot it?
A. We shot it at some bottles, either shooting at a bottle or a tree.
[55] Q. Did he have that gun with him when he came there to stay?
A. No, sir.
Q. When did he bring it there?
A. He left and went and he said he went to North Carolina.
Q. Okay, he came back from North Carolina sometime before this day that we're talking about?
A. The day of the murder?
Q. Yes?
A. Yes, sir.
Q. So you knew that he had the gun?
A. Yes, sir.
Q. On the day that you were cutting grass and the day that this alleged offense occurred?
A. Yes, sir.
Q. How much time did you spend with the defendant?
A. About thirty minutes I reckon. We were going to the store and back.
Q. Whose idea was it to go to the store?
A. He got me to carry him up there so he could get some beer.
Q. Had he been drinking that day?
[56] A. Yes, sir.
Q. Now, would you describe his condition and how he was?
A. He was pretty well loaded.
Q. Intoxicated?
A. Yes, sir.
Q. He had been drinking a lot?
A. (The witness shaking his head affirmatively)
Q. Why did he ask you to take him to the store?
A. Just to get some beer is all he said.
Q. Did you take him up there?
A. Yes.
Q. Did he see your mother up there?
A. Yes, sir. He saw her.

Q. Did you see the defendant with her?
A. Yes, sir.
Q. Did you hear any conversation that they had?
A. No, sir.
Q. How long were they in each other's company when you saw them?
A. About five minutes.
Q. Did he get some beer when he went up there?
[57] A. Yes.
Q. How much beer did he get?
A. I think twelve.
Q. He got twelve beers?
A. Yes.
Q. Regular sized ones or taller ones?
A. Regular size, the twelve ounce cans.
Q. You took him back to your house?
A. Yes.
Q. Did he give you anything for taking him up to the store, did he—
A. He just, no more than I drank a couple of beers back.
Q. You drank a couple of beers on the way back home?
A. Yes.
Q. When you got back home what was the next thing that happened that you can recall?
A. I was outside cutting the grass and cleaning up and taking the leaves and stuff like that. Then Mother came up and he came out of the house and went out and talked to her.
Q. Were you paying attention to them what they were saying at this time?
[58] A. No.
Q. All right.
A. He got in the car on the other side and it wasn't but a few minutes later that he called over and asked me if I'd go to North Carolina with him. I think he wanted someone to take him to his mother's or wherever he wanted to go. And I said no, I wasn't going nowhere. She said well, I ain't neither then. So I turned around and started doing what I was doing before and then a

little bit later she called back and said she was going to run him up to the diner and that was the last time I saw him or her.

* * * *

TESTIMONY OF DAVID A. ANDREWS

[61] *DAVID A. ANDREWS*, introduced on behalf of the Commonwealth, having been previously duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RUDY:

Q. State your name?
A. David A. Andrews, Deputy Sheriff, Chesterfield County.
Q. Now, did you know the deceased Mary H. Cole?
A. Yes, sir.
Q. How did you know her?
A. She was a cook over here at the jail.
Q. Was she there when you came to work for the Sheriff's office or were you there when she came there?
A. She was there when I went to work for the Sheriff's Department.
Q. Was she still working for the Sheriff's Department on or about the 24th or 25th or 26th of August?
A. You mean—
Q. Of last year?
A. As far as I know, yes, sir.
[62] Q. Her duties were that of a cook, is that correct?
A. Yes.
Q. Now, while you were employed at the Sheriff's Department and while she was employed at the Sheriff's Department was the defendant James A. Jackson incarcerated in the Chesterfield County jail?
A. Yes, sir.
Q. Do you know why he was there?
A. No, sir.
Q. You do not know why he was there?
A. No, sir.

Q. Did you ever see the defendant James A. Jackson with Mary Cole?
A. You mean—
Q. At the jail talking to her?
A. Yes.
Q. That type of thing?
A. Yes.
Q. Were you ever privy to hearing anything he was saying or did you just observe?
A. No, sir. Just observed.
Q. Was he a trustee at the jail?
A. Yes.
Q. Did he leave Chesterfield County jail sometime before these events happened that we're here today about?
[63] A. Did he get out of jail?
Q. Yes?
A. Yes, sir.
Q. Do you know how or when it was?
A. No, sir.
Q. You do not remember?
A. No.
Q. Did you have an occasion to see him before this particular occasion after he had gotten out of jail?
A. Yes.
Q. Where did you see him?
A. At the Chesterfield Diner.
Q. Now, how did you happen to see him at the diner?
A. I was riding with Officer Parker and we stopped to eat supper.
Q. Now, are you talking about the night Mrs. Cole disappeared or are you talking about the previous night? That's what I'm asking you about? Previous to that time?
A. It was before.
Q. Before she was killed?
[64] A. Yes, she was there.
Q. Let me rephrase the question. This was on another day that you're talking about I think. Not the day that she, not the night that she disappeared but I'm trying to get at it is, what I'm trying to ask you

is did you ever see him anytime in addition to that time?
A. No, sir.
Q. You did not?
A. No, sir.
Q. But you had an occasion to see him on the 24th of August, 1974, which was a Saturday night? You remember that?
A. Yes.
Q. Now, where did you have an occasion to see him?
A. At the Chesterfield County Diner.
Q. How did you happen to be at that diner?
A. I was riding with Officer Buckner. I rode with Parker one time and this night it was with Officer Buckner.
Q. Were you there when he came in or was he there when you came in?
A. He was there when I got there.
Q. He was there?
A. Yes.
[65] Q. Was he with anybody?
A. Yes.
Q. Who was he with?
A. Mrs. Cole.
Q. Mrs. Cole?
A. Yes.
Q. Were they sitting together?
A. I don't remember, I didn't pay that much attention to him.
Q. When you first paid attention to them who was sitting together? Or were they?
A. They came over to me.
Q. Both of them came up to you?
A. Yes.
Q. Describe the manner in which they came up to you?
A. In an everyday joking manner they came up.
Q. Did Mrs. Cole have anything to say to you or did she show any affection to you or—
A. She came over and I worked with her and she came over and knew who I was.

Q. Was the defendant with her?
A. Yes.
Q. What time was this? Do you remember?
[66] A. Approximately six or seven, between six and seven p.m.
Q. Between six and seven o'clock?
A. Yes.
Q. Now, describe their physical condition relative to the consumption of alcohol at that time as honestly as you can?
A. They had both been drinking. I would say Mr. Jackson had more than Mrs. Cole, it appeared to be that way.
Q. Mr. Jackson was in a pretty rough condition or in pretty rough shape?
A. Yes, sir.
Q. How could you tell that?
A. Just his actions. He did have a little staggering and his eyes were bloodshot.
Q. Did you have any discussion with Mr. Jackson at that time?
A. I don't believe we did much talking.
Q. Did you have any discussion with him outside the diner?
A. Yes, sir.
Q. What discussion did you have with him outside the diner?
A. He showed me a .38 revolver that he had.
[67] Q. Do you remember what it looked like?
A. Stainless, a .38 maybe a model ten or something like that.
Q. Was it rusty?
A. Rusty.
Q. Do you remember—

MR. DANIELS: I thought he said stainless steel?

WITNESS ANDREWS: It appeared to be stainless.

MR. DANIELS: Stainless steel.

WITNESS ANDREWS: I don't know.

BY MR. RUDY:

Q. Do you remember what color the handle had on it?
A. Wood.
Q. What did he tell you about the .38?
A. That it could shoot good.
Q. Did he hand it to you?
A. Yes, sir.
Q. What did you do with it?
A. Gave it back to him.
Q. Where was Mrs. Cole at this time?
[68] A. Standing right there beside us.
Q. Did you see anything of a knife?
A. Yes, sir.
Q. What kind of knife did you see?
A. I don't know for sure, I was in a hurry to get away and get in and eat. She said that she had a knife in the front seat of the car and I looked in and—
Q. I don't mean exactly but can you describe the size of the knife?
A. The standard butcher knife.
Q. It looked like a butcher knife?
A. Yes.
Q. What did she say about the butcher knife?
A. She said she had a butcher knife.
Q. Did you see them when they left?
A. They were getting in the car as I went back into the building.
Q. Who was driving the car?
A. I don't know who was driving but I told Mrs. Cole to drive.
Q. Why did you tell her to drive?
A. Because she didn't look like she had been drinking enough where she couldn't drive them home.
[69] Q. Were you trying to get them out of the diner? Kind of?
A. Yes, sir.
Q. Why was this?
A. Well, I wanted to eat and I didn't feel right with them over there and they had been drinking.
Q. She was a fellow employee of yours?
A. Yes.

Q. You were trying to get her out and get on the road?
A. Yes, sir.

* * * *

[70] CROSS-EXAMINATION

BY MR. DANIELS:

* * * *

Q. When you first saw Mary Cole and James Jackson in the diner, I believe you testified they were in there before you came?
A. Yes.
Q. Describe to the court if you would, what they were doing? Were they touching one another or either one of them, did either one of them have their arm around each other and that sort of thing?
A. I don't remember.
Q. You did not pay attention?
A. I wanted to be away from them.
Q. You and Officer Buckner and—
A. Officer Richardson, the three of us.
[71] Q. All three were in uniform?
A. Yes. Dave Richardson was with us too.
Q. And I believe you characterized these two people that we talked about as both having been drinking and this man Jackson, James Jackson was in worse shape than she was?
A. Yes.
Q. When was the first time that you ever saw the revolver?
A. I saw it sticking in back of his pants while they were in the diner.
Q. Was it when he bent over that you could see it? Could everybody see it?
A. I could see and I was sitting on the end of the table and the other officers were sitting around the side.
Q. Did they see it?
A. No, sir.
Q. Were they in a position to see?
A. No, sir.

Q. What time did they leave? How long from the time you saw them, I think you testified that it was between six and seven?
A. I would say fifteen or twenty minutes after we got there.
[72] Q. Were they loaded?
A. The defendant was.
Q. Were they joking and sort of boisterous?
A. Jackson was.
Q. When you went out did you ask Jackson to let you see the gun or did he pull it out and show it to you?
A. He pulled it out and showed it to me first.
Q. Did you let him know that you had seen this gun or that you knew he had it?
A. Yes.
Q. What did you ask him in reference to that?
A. I asked him if he'd let me keep it until he sobered up a little bit.
Q. What did he say?
A. He said, she said they were going straight home.
Q. You told her to drive because he was too drunk?
A. Yes.

[73] REDIRECT EXAMINATION

BY MR. RUDY:

Q. Did she say what they were going to do?
A. Yes, said they were going home.
Q. What did he say they were going to do?
A. Would you repeat that?
Q. Well, if Mr. Daniels doesn't object to me asking leading questions, did he indicate that they were going to go home to engage in some form of sexual activity.
A. Yes.
Q. Is that what he told you?
A. Yes, in a round about way. Yes, sir.
Q. Where was Mrs. Cole when he said that?
A. Standing right there.
Q. Right there with him?
A. Yes, sir.

RECROSS-EXAMINATION

BY MR. DANIELS:

Q. What was her reaction?
A. She smiled and left and just laughed.

* * * *

TESTIMONY OF MARK E. WILSON

[74] *MARK E. WILSON*, introduced on behalf of the Commonwealth, having been previously duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RUDY:

Q. State your name?
[75] A. Detective Mark E. Wilson.
Q. Detective Wilson, were you so employed in that capacity on August 24, 1974?
A. Yes.
Q. In that capacity as a detective for Chesterfield County Police Department, did you have an occasion to investigate the facts and circumstances surrounding the indictment that's been read against this defendant today?
A. Yes.
Q. Would you describe for the court, how you first became involved in this case and what caused or what course of action your investigation took from that point on?
A. I received a telephone call at my home and shortly thereafter, around 1:30 a.m. on the morning of August 26, 1974. That call informed me that there had been a body found at Mt. Gilead Church located in Chesterfield County.

* * * *

[76] Q. Did you participate in taking some photographs of the body?
A. Yes.
Q. And were there some other pictures that were taken?
A. Yes.

Q. Were these the pictures that were taken?
A. Yes.
Q. I show you a series of five pictures and ask you to look at them and I'll ask you further if they accurately portray the scene where the body was located, at the time you arrived at the scene?
A. That's correct.
Q. Now, I notice you were not the first police officer to arrive there?
[77] A. No.
Q. Now on this picture you will notice that the body clothing or the body was only clothed from the waist up? Is that the way it was found by the first person who arrived there?
A. Yes.
Q. Now, I show you another picture and ask if you can identify that picture?
A. That is located about eight feet from the body where there were six shells, there were six shell casings found there. There was also a beer can in this particular picture and this is a picture of it.

* * * *

BY MR. RUDY:

Q. Did you pick the cartridges up?
[78] A. Yes.
Q. I want to show you this plastic container, can you identify it?
A. Yes, that's the shells that I picked up at the scene.

* * * *

[80] Q. I show you these three plastic containers and ask you if you can identify those?
A. These are the shell casings found at the residence. This was one that was in the house and I marked that separately. This was at the house. I did not mark identifying marks, I marked the container here.

* * * *

[89] Q. Did he make a statement to you at that time?
A. Yes, he did.

Q. All right, do you have that statement reduced to writing?

A. Yes, I do.

Q. Would you read it please sir?

A. Yes. The statement was in the form of questions and answers. First was a question and then the answer. Prior to this time I asked him if he wished to make a statement and he had decided that he would make a statement. Then, this starts the statement. "Jackson, how do you want me to start? Detective Wilson, just go ahead and tell us what happened from the beginning. Jackson, My name is James A. Jackson. [90] I was living with Curtis Cole. On Saturday, August 24th, Mrs. Cole came out to the house about 4:30 p.m. She tooted the horn and I came out to the car. She asked me would I go riding with her. I told her yes. I got in the car and we drove off and went to the Chesterfield Diner. We went in and had a sandwich and a cup of coffee. We walked back out to the car and then we had a few words, you know, arguing, and she tried to stab me with a knife. I pushed her back and hit her. So then I left her and went over to the Bi-Rite Super Market. I called me a taxi. In the meantime she pulled up and asked me to ride down the road with her. I was scared and shakey, which I was. So then, I got back in the car with her and we rode down the road over at the church or what? Detective Ward, Yes, tell where you were. Jackson, Well, we rode over to some church, somewhere. I don't know where we were. So then we got messing around and she said she wanted to have sex with me. I told her no. Then she go mad and tried to stab me again. So I shot in the ground and then she kept right on trying to stab me and so forth. Then I loaded the gun and told her that I didn't want to have nothing to do with her. Then she threw the knife down and tried to take the gun from me. That's where it happened. Detective Ward, What happened? Jackson, That she tried to take the gun and the gun went off. Detective Wilson, Then what happened? Jackson, Then I got scared and [91] and panicky. I got in the car and drove to North Carolina with it. I parked the car over at the parking lot in Fayetteville,

North Carolina. Then, you want me to tell about the boy selling it? Detective Wilson, Yes. Jackson, Then Ernest Davis took the car over to Leo what's that crazy mans' name, Holhouser? Detective Ward, Hockstin or something, I don't know. Detective Wilson, Leo something, I can't think. Jackson, I don't know it then. Took the car over there and told him he'd sell it to him. That's all I know about it. Detective Wilson, What happened to her pocketbook and things of this sort? Jackson, When I left from Virginia, her pocketbook and everything that was in the car was still in the car. I brought it to North Carolina and locked it up at Topeka Heights. Detective Wilson, Was there any money in her pocketbook? Jackson, I do not know. I never did go in it. Detective Wilson, You say you went to Florida after you left North Carolina? Jackson, Yes, sir. Detective Wilson, Then you came back to Fayetteville again? Jackson, Yes, sir."

Q. Did he say how long he was in Florida?

A. I don't recall.

THE COURT: Proceed.

WITNESS WILSON: "Detective Wilson, Is that when the police—Jackson, So that's when the police got me. Detective Ward, How did you go to Florida? Jackson, I went to Florida on a bus. [92] Detective Wilson, You had a $100 bill in your possession. How did you come by this $100 bill? Jackson, I borrowed it from Mr. Leo Holshouser, Houserhols, something like that, and told him I would pay him back this Friday. I would send him the money back. Detective Wilson, Did buying the car from this girl have anything to do with this $100? Jackson, No, sir. It did not. Detective Wilson, Why did this girl think she had a right to sell the car? Jackson, I do not know. Detective Wilson, You know she said you forced her to do it. Is this false? Jackson, Yes, sir it is. Detective Wilson, Is there anything else about this that you can tell us? Jackson, no, sir. That's all I know about it. Detective Wilson, Did she cut you any time that she swung at you with a knife? Jackson, no answer. Detective Wilson, How much did you have to drink that night? Jackson, I drank a fifth of Old Crow, a fifth of

Wild Turkey and a pint of—Detective Wilson, Did she help you drink any of this? Jackson, She drank half of the whiskey with me and we bought two six packs of beer. Detective Wilson, Did you all drink that together too? Jackson, Yes, sir. [93] Detective Wilson, would you describe your condition as being high or drunk or what? Jackson, Well, I wouldn't say I was drunk, but I would say I was pretty high. Detective Wilson, What about her condition. Was she high? Jackson, I'd say she was almost drunk. I don't know what she had been drinking. She smelled like a liquor factory when she came over to the house. Detective Ward, What was the argument you all had at the diner first? When you got out of the car and you called a taxi. What was said at that argument? Jackson, Well, she told me, she said, I want to have sex with you. I told her no. I said I don't want nothing to do with you. She said, well, if I can't have you no other woman is going to have you. So that's when I left. I went over and took a taxi. Detective Ward, How many shots did you fire in the ground before you reloaded up at the church to scare her? Jackson, I shot once and then I saw I couldn't scare her so then I shot five more times and reloaded. Detective Ward, Where did you shoot, what direction did you shoot into the ground? Jackson, I shot north. Detective Ward, Would you show us the spot where you fired these rounds into the ground? Jackson, Yes, sir. [94] Detective Ward, And then you dumped the shells? Jackson, Yes, sir. Detective Ward, And reloaded? Jackson, Yes, sir. Detective Ward, And after that the struggle over the gun took place? Jackson, Yes, sir. Detective Ward, And the gun went off and killed her? Jackson, Yes, sir. Detective Ward, Exactly where was she in relationship to the car when the shot was fired? Jackson, She was on the driver's side of the car. Standing on the outside of the car. Detective Ward, Was the door open or closed? Jackson, It was open. Detective Ward, The door was open? Jackson, Yes, sir. Detective Wilson, Jimmy, you have listened to this tape, now and you've paid attention to it, you understand your rights and is this exactly what happened now? Is this, the death of Mrs. Cole? Jackson,

Sir? Detective Wilson, As far as you know, is this exactly what happened that caused the death of Mrs. Cole? Do you want to change any part of this statement? Jackson, No, sir. Detective Wilson, It's exactly like you want it? Jackson, Yes, sir. It's not like I want it—it's the way it is. That's the truth. Detective Wilson, Jimmy, there is one more question we wanted to ask you. Where did you strike [95] her and what did you strike her with? Jackson, With the butt of the gun in the back of the head. I struck her with the butt of the gun in the back of the head. Detective Wilson, when was this? Jackson, Up there at Chesterfield Diner. Detective Ward, What was her reaction to the blow when you hit her? What happened to her and what did she do? Jackson, She just fell back up against the car and shook her head and came back. Detective Ward, And you took off? Jackson, And I took off. Detective Wilson, We told you that she was shot twice, and she wasn't shot but once. You are sure that no other bullet that you fired struck her? Jackson, No, sir. That was in the opposite way. I didn't mean to shoot her."

* * * *

TESTIMONY OF CLEON C. MAUER

[102] *CLEON C. MAUER*, introduced on behalf of the Commonwealth, having been previously duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RUDY:

Q. Mr. Mauer, state your name and occupation?
[103] A. Cleon C. Mauer. I am employed with the Bureau of Forensic Science in Richmond, Virginia. I am employed as a firearms identification specialist.

MR. RUDY: Mr. Daniels has agreed to stipulate Mr. Mauer's qualifications.

MR. DANIELS: I've heard Mr. Mauer testify before.

BY MR. RUDY:

Q. There was submitted to you in this case, a series of items for examination?

A. Yes.

Q. One of which was this revolver I believe?

A. Yes.

Q. And these cartridges and I don't want to get you any more confused than I am, about these things, there are six cartridges which have already been identified as having been found at the scene of the crime on the ground. There are three cellophane packages containing cartridges which were found at the residence of a man named Curtis Cole. There's a bullet which was found on the inside of a vehicle which has been identified as that belonging to the deceased. Mary H. Cole. I'd ask you if you have had an occasion to make or to examine these various articles?

[104] A. I have.

Q. Would you tell the court what your examination of these articles revealed?

A. These are—

Q. These are the court numbers now?

A. Yes. This is Exhibit Number 1. I ran an examination of this revolver which is Exhibit Number 1 and I test fired this revolver. I recovered the test fired bullets and the test fired cartridge cases. I made a comparison, a microscopic examination involving the test fired cartridge cases with the fired cartridge cases in Exhibits 9, 10 and 11. The fire cartridge cases in Exhibit 11, and the fired cartridge cases contained in Exhibit 10 and the fired cartridge cases contained in Exhibit Number 12. I also made a comparison, a microscopic examination involving the test fired bullets from Exhibit Number 1 with the fired bullet contained in Exhibit Number 19.

Q. What were the results of your examination and what conclusions did you draw being an expert in this field?

A. Based upon the examination which I conducted, it's my opinion that the cartridge cases contained in Exhibit Number 8, the cartridge cases contained in Exhibit Number 11, the cartridge cases contained in Exhibit Number 10, the cartridge cases contained in Exhibit Number 12, were fired [105] in the revolver which is Exhibit Number 1. Further, that the fired bullets contained in Exhibit Number 19 was fired from the revolver which is Exhibit Number 1.

Q. Now Mr. Mauer, did you make an examination of some articles of clothing? For possible powder burns?

A. I did.

Q. What did your examination reveal sir?

A. Based upon the examination which I conducted, I examined Exhibit Number 14 and I found two holes and I also examined Exhibit Number 15 and I found penetrations in that.

Q. What conclusions were you able to draw insofar as how far the gun was away from the lady when it went off?

A. In my opinion these holes found in Exhibit 14 and 15 were caused by a bullet fired from a firearm having a muzzle distance of approximately one inch from the garment at the instance it was fired.

SUPREME COURT OF THE UNITED STATES

No. 78-5283

JAMES A. JACKSON, PETITIONER

v.

VIRGINIA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO the United States Court of Appeals for the Fourth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

December 4, 1978

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IN THE

SUPREME COURT OF THE UNITED STATES

Record No. 78-5283

JAMES A. JACKSON

Petitioner

v.

COMMONWEALTH OF VIRGINIA, and
R. ZAHRADNICK, Warden

Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO GRANTING OF CERTIORARI

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Richmond, Virginia 23219

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Respondents

RESPONDENTS' BRIEF IN OPPOSITION
TO GRANTING OF CERTIORARI

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not reported. Petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1254(1).

ISSUE PRESENTED

I. FOR PURPOSES OF FEDERAL HABEAS CORPUS REVIEW WAS THE EVIDENCE SUFFICIENT FOR CONVICTION?

ARGUMENT

I. FOR PURPOSES OF FEDERAL HABEAS CORPUS REVIEW EVIDENCE WAS SUFFICIENT FOR CONVICTION.

Petitioner was charged with and convicted of murder in the first degree. In his Petition for a Writ of Habeas Corpus filed in the United States District Court for the Eastern District of Virginia, he alleged that the evidence was insufficient for conviction. The District Court granted the Writ, holding that the record was "totally devoid of any evidence of premeditation...." The case was then appealed to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals held that there was evidence of premeditation sufficient for conviction.

While Petitioner argues that there was evidence to the effect that he was "extremely intoxicated" at the time of the killing, he does not deny that there was some evidence to show that he was capable of premeditation, an element of first degree murder.

Under Virginia law, premeditation need not exist for any particular length of time and may be formed at the moment of the commission of the act. Commonwealth v. Brown, 90 Va. 671, 19 S.E. 447 (1894); Shiflett v. Commonwealth, 143 Va. 609, 130 S.E. 777 (1925).

The victim was found nude below the waist. It would not have been unreasonable for the Trial Court to conclude that the Petitioner shot the victim because she resisted his sexual advances that he planned hours before and for which, hours before, he possessed a weapon with which to accomplish his purpose. The victim was shot two times. The evidence did not show conclusively that Petitioner was so intoxicated that he could not deliberate. It is thus abundantly clear that the record was not devoid of evidence of premeditation. The opinion of the Court of Appeals was therefore clearly correct.

Petitioner now argues that the test of whether the evidence was sufficient for conviction should rest upon whether the evidence was sufficient to show guilt beyond a reasonable doubt. His argument is based upon the opinion of Mr. Justice Stewart, dissenting from denial of certiorari in Freeman v. Zahradnick, 429 U.S. 1111 (1977). However, this Court in Thompson v. City of Louisville, 362 U.S. 199 (1960), held that a Federal Court in habeas corpus must deny the writ if in the State Court record there is "some" evidence to prove each element of the offense. To extend the rule of Thompson, supra, so that a test of reasonable doubt is applied would be to thrust upon Federal Courts complete review of nearly all State Court convictions. It is in the interest of both comity and the administration of justice that the rule not be so extended.

In Grundler v. North Carolina, 283 F.2d 798 (4th Cir. 1960), the Court stated in 283 F.2d at p. 801 as follows:

> "There is a difference between a conviction based upon evidence deemed insufficient as a matter of state criminal law and one so totally devoid of evidentiary support as to raise a due process issue. It is only in the latter situation that there has been a violation of the Fourteenth Amendment, affording the state prisoner a remedy in a federal court on a writ of habeas corpus."

Certiorari should not be granted in the instant case. There are neither special nor important reasons for granting certiorari herein, as are required by Rule 19, Rules of the Supreme Court of the United States. The decision of the Court of Appeals is in accord with cases decided long before this. The decision of the Court of Appeals is clearly correct, and to review this matter on certiorari would only result in this Court's applying settled law.

CONCLUSION

For the foregoing reasons the Respondents respectfully submit that this Honorable Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

MARSHALL COLEMAN
Attorney General of Virginia

LINWOOD T. WELLS, JR.
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

This is to certify that I, Linwood T. Wells, Jr., Assistant Attorney General of Virginia, am a member of the bar of the Supreme Court of the United States, and on November 14th, 1978, I mailed a true copy of this Respondents' Brief in Opposition to Granting of Certiorari to Carolyn J. Colville, Esquire, Colville & Dunham, 2 North First Street, Richmond, Virginia 23219, Counsel for the Petitioner.

Linwood T. Wells, Jr.
Assistant Attorney General

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5283

JAMES A. JACKSON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA
AND
R. ZAHRADNICK, Warden,

Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE PETITIONER

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Respondents

On Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit [A. 30-35] is not reported. The opinion of the United States District Court for the Eastern District of Virginia [A. 25-28] is also not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered August 3, 1978. The petition for certiorari was filed on August

25, 1978 and was granted on December 4, 1978 [A. 64]. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in deciding if the Petitioner's due process rights had been violated, the United States Court of Appeals for the Fourth Circuit erred in applying the rule in *Thompson* v. *City of Louisville*?

STATEMENT

On March 27, 1975 Petitioner James A. Jackson was tried on a plea of not guilty, without intervention of a jury, before the Honorable Ernest P. Gates, Judge of the Circuit Court of Chesterfield County, Virginia, upon an indictment charging him with the murder of Mary Houston Cole (hereinafter Mrs. Cole). [Tr. 4-7]. The evidence consisted of the testimony of various witnesses on behalf of the Commonwealth as summarized before.

Petitioner Jackson first met the deceased, Mrs. Cole, a cook for the Chesterfield County Jail, when he was an inmate-trustee there. [A. 49-50]. Upon his release, Mrs. Cole befriended him, with some indication that she wished him to stay with her. Contrary to this desire, Petitioner Jackson arranged to stay with Mrs. Cole's son, Curtis, and his family. [Tr. 50]. Apparently, Petitioner Jackson and Mrs. Cole met one another on several occasions during the approximately one-

month period that he stayed with the Curtis Cole family. [Tr. 51, A. 39].

On the day of Mrs. Cole's death, August 24, 1974, Petitioner Jackson began drinking during the morning. [A. 42]. According to the testimony of Sally Cole, Petitioner Jackson and her husband Curtis shot at bottles placed on a tree trunk in the backyard during the early afternoon. [A. 41-42]. By that time of day Petitioner Jackson had drunk already "several bottles" of alcoholic beverage. [A. 42]. While Curtis Cole did not recall shooting any bottles that day, he did remember the gun from a previous occasion when Petitioner Jackson returned home from one of his several trips to North Carolina and showed it to him. He remembered that they shot the gun at that time. [A. 45-47].

Between 2:30 and 3:00 p.m. Curtis drove Petitioner Jackson to the Bi-Rite Super Market where the latter talked for five minutes with Mrs. Cole, also present at the store. [A. 47-48]. By that time in the afternoon, Curtis described Petitioner Jackson as being "pretty well loaded." [A. 47]. Mrs. Cole bought a six-pack of beer [A. 87], and Petitioner Jackson bought twelve cans of beer. [A. 48].

After completing her grocery shopping, Mrs. Cole returned to her home. After preparing dinner she announced to her husband that she might be going to Carolina and then left in the car. [A. 40]. By that time she had consumed two to three cans of beer. [A. 40].

Between 5:30 and 6:00 p.m. that afternoon, Mrs. Cole drove to her son's home and picked up Petitioner Jackson. [A. 41]. They sat in the car for a period of time, and then Mrs. Cole called to her son Curtis and told him that she was going to the diner for dinner. [A. 48-49]. Salley Cole testified that she could not recall hearing any argument between her mother-in-law and Petitioner Jackson prior to the time they departed. [Tr. 39].

The two drove to the Chesterfield Diner where they were observed by three police officers. Both Mrs. Cole and Petitioner Jackson went over to see Deputy Sheriff David A. Andrews. They approached him in what was described as an "everyday joking manner." [A. 51]. In addition, Petitioner Jackson was remembered as being "boistrous." [A. 55]. Both appeared to have consumed a quantity of alcohol and Andrews agreed that Petitioner Jackson "was in a pretty rough condition." [A. 52]. This was evidenced by his staggering footsteps and his bloodshot eyes. [A. 52]. When asked if both were "loaded," Andrews applied in the affirmative as to Petitioner Jackson. [A. 55].

When Andrews, Mrs. Cole and Petitioner Jackson went outside, the latter showed Andrews a .38 revolver that had been "sticking in back of his pants." [A. 52, 54]. Mrs. Cole told Andrews that she had a knife in the front seat of the car. [A. 53]. The knife was characterized by Deputy Sheriff Andrews as a "standard butcher knife." [A. 53]. Andrews examined the gun and asked Petitioner Jackson if he could not keep

the gun until the latter had sobered up. [A. 55]. Petitioner Jackson said that they were going straight home "to engage in some form of sexual activity." [A. 55]. Mrs. Cole was present during this entire conversation, and when Petitioner Jackson announced their intention to have sexual relations, Mrs. Cole smiled and laughed. [A. 55-56]. Apparently, Andrews gave him back the gun at this point.

The deputy sheriff advised Mrs. Cole to drive the car since Petitioner Jackson was "too drunk" to drive [A. 55] and because "she didn't look like she had been drinking enough where she couldn't drive them home." [A. 53]. He admitted that he wanted to get the two of them out of the diner in order that he could eat his meal without their presence. [A. 53-54]. From that point onward, the facts are based on a statement later given by Petitioner Jackson to the police and testified to by Mark E. Wilson, a detective for the Chesterfield County Police Department.

Before driving away from the diner, Mrs. Cole and he exchanged words which led to Mrs. Cole trying to stab him with her butcher knife. The words were to the effect that if she could not have him then no other woman would have him. Petitioner Jackson explained that the argument centered on his refusal to have sex with her. He then pushed her away and struck her on the back of the head with the butt of the revolver. [A. 60].

Admittedly frightened and unsteady, he then crossed the street to the Bi-Rite Super Market to call

a cab. [A. 58]. Mrs. Cole drove up and persuaded Petitioner Jackson to get back into the automobile with her. From there Mrs. Cole drove to a secluded church parking lot where the two of them began "messing around." [A. 58]. In this period of time together, the Petitioner drank a fifth of Old Crow, a fifth of Wild Turkey and a pint of something else. Mrs. Cole helped him drink both the whiskey and an undetermined amount of beer. [A. 59-60].

At the church the Petitioner remembered that Mrs. Cole again sought sexual relations, which he refused. [A. 58]. With both of them now outside the car, Mrs. Cole, naked from the waist down, picked up the butcher knife and tried to stab him. As a warning, he fired the revolver six times into the ground while Mrs. Cole repeated her attacks with the knife. He reloaded the revolver, and Mrs Cole threw down the knife and tried to wrest the gun away from him. [A. 58]. In the ensuing scuffle two shots were fired killing Mrs. Cole. [Tr. 105]. The time of death was undisclosed in the record.

Petitioner Jackson fled to Fayetteville, North Carolina in Mrs. Cole's car. He went to Florida and later returned to Fayetteville where he was arrested and returned to Chesterfield County, Virginia. [Tr. 110].

The autopsy report, introduced as Commonwealth's Exhibit Number 13, indicated that one bullet had passed through Mrs. Cole's left breast from left to right and that the fatal bullet had passed through her

left chest. The deceased's blood alcohol content was 0.17 by weight by volume. [Tr. 81, 114].

At the conclusion of the evidence, the Commonwealth's Attorney declined to argue the case on the basis of seeking a conviction for first degree murder because of the degree of intoxication of the deceased. [Tr. 111-114]. However, the court observed the color photograph introduced into evidence as Commonwealth's Exhibit 9 and referred to the mutilation, which was never pointed out in the autopsy report. [Tr. 115]. The court expressed the opinion that it was "a very horrible picture." [Tr. 115].

After expressing the opinion that if the Petitioner had been drunk he would have been arrested by the police officers, [Tr. 116], the court found Petitioner Jackson guilty of first degree murder. [Tr. 117].

Following a pre-sentence report, the Judge sentenced Petitioner Jackson to thirty (30) years in the Virginia State Penitentiary. [Tr. 125]. Counsel for Petitioner Jackson moved to set aside the judgment as contrary to the law and evidence, which motion was denied. An exception was noted. [Tr. 125-126].

On the basis of the above ground, the conviction was appealed unsuccessfully to the Supreme Court of Virginia on February 10, 1976. Thereupon, Petitioner Jackson filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Virginia on June 18, 1976. In addition to allegations concerning defects in the indictment and the

involuntariness of his confession, he alleged that the conviction was contrary to the law and fact in that it was not supported by evidence of malice or premeditation. [A. 6].

The Honorable D. Dortch Warriner of the United States District Court for the Eastern District of Virginia dismissed the first two allegations on the grounds that he had failed to exhaust his State remedies on those issues. He then ordered that a writ of habeas corpus be issued and a new trial be commenced within sixty (60) days from the entry of the Order on October 1, 1976. [A. 28]. In a memorandum filed on that same day, the court found that there was a lack of evidence showing the premeditation required for a conviction of murder in the first degree. [A. 25]. The court applied the rule that Petitioner Jackson was entitled to the relief only if the record was devoid of evidence to support the conviction. The Commonwealth of Virginia filed a timely appeal to the United States Court of Appeals for the Fourth Circuit. [A. 29].

In a *per curiam* opinion dated August 3, 1978, the United States Court of Appeals for the Fourth Circuit reversed the Order of the district court by finding "some" evidence of premeditation in the fact that Petitioner Jackson had the capability and time to reload his revolver and from the fact that Mrs. Cole was shot twice. [A. 33]. The court felt that it need not consider whether the trial judge was "warranted in finding that there was premeditation beyond a reasonable doubt." [A. 33-34]. In so holding, the court indicated that it needed further guidance as to the applicability of *In re Winship*, 397 U.S. 358 (1970) and then went on to apply the rule of *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960) indicating that a federal court must deny the writ of habeas corpus if there is "some" evidence of each of the elements of the crime. [A. 34].

SUMMARY OF ARGUMENT

Under the rule of *In re Winship*, 397 U.S. 358 (1970) the State of Virginia was under a constitutional obligation to prove Petitioner Jackson's guilt beyond a reasonable doubt. If the State failed to meet the burden and yet convicted him of first degree murder then Petitioner Jackson was deprived of liberty without due process of law. This is exactly what the Petitioner alleged when he filed his Petition for Writ of Habeas Corpus after he had exhausted his State court remedies.

In his petition he contended that his conviction was not supported by evidence of premeditation. [A. 6]. Both the federal district court in granting the writ and the federal appellate court in denying the writ felt obligated to follow the rule first enunciated in *Thompson* v. *City of Louisville*, 362 U.S. 199, 206 (1960) whereby the writ of habeas corpus could be issued only if the record was completely devoid of evidence of the offense, in this case premeditation. In applying this rule to the facts of the case the two courts came

up with different results. The appellate court felt obligated to follow this rule even though it seemingly had doubts whether this was the proper rule to follow in light of the holding of *In re Winship*. [A. 34].

It is respectfully submitted that the writ of habeas corpus should be issued where no rational trier of fact could find a defendant guilty beyond a reasonable doubt. This conclusion can be reached by following *In re Winship* to its logical conclusion: if after giving the proper deference to the state court determination it is found that no rational trier of fact could have found the defendant guilty of the offense beyond a reasonable doubt, then the defendant has lost his liberty without due process of law. He would then in fact be innocent of the charge of which he was convicted.

The proper historical remedy in this situation has been the use of the writ of habeas corpus. The traditional scope of the writ of habeas corpus is to assure that an innocent person is not suffering the loss of liberty. *Stone* v. *Powell*, 428 U.S. 465, 491 n.31 (1976). Thus where the guilt of an accused has not been constitutionally established, the writ of habeas corpus is the appropriate remedy. It was the duty of the federal courts to determine whether the Petitioner's due process rights had been abridged.

Given the physical condition of the accused at the time of the death and the surrounding circumstances of the case, no rational trier of fact could have found Petitioner Jackson guilty of first degree murder be-

yond a reasonable doubt. As such he is entitled to the issuance of the writ of habeas corpus.

ARGUMENT

I

TO GIVE SUBSTANCE TO THE HOLDING OF *IN RE WINSHIP*, IT WAS THE DUTY OF THE FEDERAL COURTS TO MAKE A DETERMINATION OF WHETHER A RATIONAL TRIER OF FACT COULD HAVE FOUND THE PETITIONER GUILTY OF FIRST DEGREE MURDER BEYOND A RESONABLE DOUBT.

A. When The Legislature Made Premeditation An Element Of The Offense Of First Degree Murder, The State Was Under An Obligation To Prove That Element Beyond A Reasonable Doubt.

The landmark case of *In re Winship*, 297 U.S. 358 (1970) as clarified seven years later by the rule of *Patterson* v. *New York*, 432 U.S. 197 (1977), stands for the proposition that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." (432 U.S. at 210). Leaving aside the concern that the State could circumvent the requirements of *In re Winship* by redefining the offense (dissenting opinion of Justice Powell, *Patterson* v. *New York*, 432 U.S. at 224), the holding is clear that once a State defines an of-

fense, the prosecution must prove each element of the offense beyond a reasonable doubt.

In the context of the present factual situation, the applicable statute, Virginia Code Annotated § 18.2-32, defines murder of the first degree as:

> [m]urder other than capital murder, by poison, lying in wait, imprisonment, starving or by any *willful, deliberate, and* premeditated killing, or in the commission of, or attempt to commit, arson, rape, robbery, burglary or abduction, except as provided in § 18.2-31, is murder of the first degree . . .
>
> All murder other than capital murder and murder in the first degree is murder of the second degree . . . . [emphasis added].

By placing premeditation in the definition of the offense, the state legislature chose to place an obligation on the prosecution to prove that element beyond a reasonable doubt. Despite the fact that the accused was convicted, if that burden was not met then the accused suffered a deprivation of liberty without due process of law. This is exactly what Petitioner Jackson alleged in his Petition for Writ of Habeas Corpus when charged that his conviction was unsupported by evidence of malice and premeditation. [A. 6]. To reinforce his claim he recitated that at the time of the offense he was highly intoxicated.

It is a matter of basic hornbook law, long held to be true in the Commonwealth of Virginia, that a mind

may be so bewildered from intoxicating beverages as to be entirely incapable of deliberation. *Cody* v. *Commonwealth*, 180 Va. 449, 23 S.E.2d 122 (1942); *Drinkard* v. *Commonwealth*, 165 Va. 799, 183 S.E. 251 (1936); *Honesty* v. *Commonwealth*, 81 Va. 283 (1886); *Willis* v. *Commonwealth*, 73 Va. (32 Gratt.) 929 (1879). This apparently was the basis for his appeal.

While an analysis of *Patterson* v. *New York* seems to show that the state may place a burden of persuasion on the defendant to prove an affirmative defense, doubt exists concerning the issue of whether a state by statute could put the burden of persuasion on the accused to prove intoxication before mitigating the offense. In *Patterson* v. *New York* the court intimated that defenses which negate "any facts of the crime which the State is to prove" are in a different category. (432 U.S. at 207). Certainly intoxication could negate the fact or element of premeditation which by statute the State is to prove beyond a reasonable doubt, and thus seemingly it would fall within this different category of defenses.

Assuming, however, that the State could have placed the burden of persuasion on the defendant (i.e. Petitioner Jackson) and assuming he could not meet this burden, the fact remains that the legislature chose not to do so. According to the statute as it stands, the State was and is required to prove the element of premeditation beyond a reasonable doubt. It is no answer that the offense could have been defined differently. It is not the duty of the judiciary to

look at what the legislature could have done. Instead, it must look at what the legislative body has actually done.

This is entirely consistent with the reasoning of the recent decision of *Sanabria* v. *United States*, 46 U.S.L.W. 4646, 4650 (U.S. June 14, 1978) where, in the context of a question of double jeopardy, the Court held:

> It is Congress and not the prosecution which establishes and defines offenses. Few, if any, limitations are imposed by the Double Jeopardy Clause on the legislative power to define offenses . . . But once Congress has defined a statutory offense by its prescription of the 'allowable unit of prosecution' . . . that prescription determines the scope of protection afforded by a prior conviction or acquittal. Whether a particular course of conduct involves one or more distinct "offenses" under the statute depends on this congressional choice. [internal citations omitted].

In that case Congress could have chosen to define the elements of the offense differently and thus conceivably could have avoided the issues of double jeopardy. However, this Court clearly said that once a statutory offense is defined, it was the duty of the court to look not at what Congress might have done but to look at what it actually did.

In this case where the legislature did not choose, if indeed it could choose, to put the burden on Petitioner Jackson to prove his intoxication, it is no answer to

say that the legislature could have legally done so. The burden of proving premeditation remained with the State. This burden was neither increased or decreased by any attempt by the accused to discredit the possibility that he was so intoxicated as to be incapable of premeditation. In any event any evidence offered by the accused did not change the fact that the risk of persuasion remained with the Commonwealth. *Commonwealth* v. *Rose*, Pa., 321 A.2d 880 (1974).

Petitioner Jackson maintains that the Commonwealth of Virginia did not meet its burden of persuasion in his individual case. The question then remains as to the proper standard to be applied by a federal court in deciding if it has jurisdiction to afford relief when this type of allegation is made.

B. The Court of Appeals Was Incorrect In Its Determination That *Thompson* v. *City of Louisville* Was The Proper Rule To Follow In Granting Or Denying The Writ Of Habeas Corpus.

Both the federal district court and the court of appeals felt that the proper standard to apply to the facts of the case was the rule of *Thompson* v. *City of Louisville*. In that case this Court held that it was a violation of the due process clause for a conviction to stand when there was no evidence to support it. At the time the case was decided, this Court had not yet articulated its stand that the Constitution protects

against a conviction "except upon proof beyond a doubt of every fact necessary to constitute the crime for which he is charged." [*In re Winship*, 397 U.S. 358, 364 (1970)]. Instead this Court relied on the reasoning in *DeJonge* v. *Oregon*, 299 U.S. 353 (1937) that stated that a conviction based on a charge that was not made denied due process, to hold that "it is a violation of due process to convict and punish a man without evidence of his guilt." *Thompson* v. *City of Louisville, supra*, at 206. That decision should be perceived as one step in the process of determining how much evidence is sufficient to convict in a criminal setting.

Certainly if one was convicted when the record was devoid of any evidence of the crime then certainly the person was convicted without proof beyond a reasonable doubt. Once *In re Winship* held that the due process clause required beyond a reasonable doubt (397 U.S. at 364), then any person whose rights would be protected by the holding in *Thompson* v. *City of Louisville* would also be protected by the later holding in *In re Winship*.

It is submitted that given the facts of *Thompson* v. *City of Louisville* the conviction was not totally devoid of evidentiary support. The Court assumed "that merely 'arguing' with a policeman is not, because it could not be 'disorderly conduct' as a matter of the substantive law of Kentucky." [362 U.S. at 206]. Yet, certainly, arguing with the policeman was some evidence of disorderly conduct. What the Court

was in effect saying was that no rational trier of fact could draw that conclusion.

It would take remarkably little to amount to some evidence. As Chief Justice Warren expressed in his dissenting opinion in *Jacobellis* v. *Ohio*, 378 U.S. 184, 202 (1964), "[A] mere modicum of evidence may satisfy a 'no evidence' standard . . ." Certainly it would appear that the defendant in *Thompson* v. *City of Louisville* by merely being present in the cafe was some evidence that he was loitering there. Therefore, given that there was some evidence of guilt, the logical explanation for the case was that while there was some relevant evidence that indicate guilt, there really was not enough evidence to convict the defendant. This case along with *Garner* v. *Louisiana*, 368 U.S. 157 (1961) that came after it can be characterized as a search for some standard to decide how much evidence is sufficient to convict. It was not until *In re Winship* that the decision was made.

The Court in the three cases of *In re Winship*, *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975) and *Patterson* v. *New York*, 432 U.S. 197 (1975) did not expressly address the status of *Thompson* v. *City of Louisville* in light of the later case of *In re Winship*. The meaning of these cases is clear: the United States Constitution requires that in a criminal law setting, the accused must be found guilty beyond a reasonable doubt. This is essentially a question of sufficiency of the evidence, which is the same question covertly present in *Thompson* v. *City of Louisville*. To say that *In re Winship* is

the governing law when a question of sufficiency of the evidence is present does not diminish the importance of *Thompson* v. *City of Louisville.* It was an important step in the realization that a constitutional standard of proof was needed in criminal law that should not be perceived in its correct historical setting.

Once it is accepted that *In re Winship* was the culmination of the process started in *Thompson* v. *City of Louisville,* the question still remains as to the role of the federal court when a petitioner, convicted of an offense in the state court alleges that he or she should not have been found guilty beyond a reasonable doubt and that in fact no rational trier of fact could have found him or her guilty beyond a reasonable doubt.

C. When A State Convicts A Person On Proof Less Than What The Legislature Requires, The Federal System Is Empowered To Intrude Into The Affairs Of The State To Protect The Federal Interest Involved In That Individual Case.

As this Court stated in *Chapman* v. *California,* 386 U.S. 18, 21 (1967):

> Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied.

To analogize the above to the present factual setting, the determination of whether a conviction of the crime of first degree murder should stand when, as alleged, the State has failed to afford the federal constitutionally guaranteed right of the accused to protection of his liberty right unless proven guilty beyond a reasonable doubt, is a federal question.

As the Court noted in *Mullaney* v. *Wilbur,* 421 U.S. 84, 97-98 (1974), the protection afforded by the due process are not lessened or rendered unavailable by the fact that the accused may not be entirely exonerated. The federal question remains viable.

The traditional means of testing the viability of the federal question is through the use of the writ of habeas corpus, whose history dates back to the Judiciary Act of 1789, c.20, § 14, 1 Stat. 81. In tracing this history the Court noted in *Fay* v. *Noia,* 372 U.S. 391, 402 (1963) that

> [I]ts root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment, if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release. Thus there is nothing novel in the fact that today habeas corpus in the federal courts provides a mode for the redress of denials of due process of law.

Because of the seriousness of imposing a criminal sanction it should be imposed only on the guilty. The rule of *In re Winship* solidified this notion. It is respectfully submitted that if one is convicted of a crime when no rational trier of fact could have found the accused guilty beyond a reasonable doubt, then that person's imprisonment cannot "conform to the fundamental requirements of law." That person's liberty interest, so emphasized in *In re Winship*, 397 U.S. at 358, has been taken away without due process of law. Until a rational trier of fact finds the accused guilty beyond a reasonable doubt of the crime then technically the accused is innocent of the charge for which he was charged and convicted.

The recent case of *Stone* v. *Powell*, 428 U.S. 465 (1976) viewed the main function of the writ of habeas corpus as the protection of the innocent when one's liberty was unconstitutionally denied. This was explicitly stated in footnote 31 of the opinion:

> Resort to habeas corpus, especially for purposes other than to assure that no innocent suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government.

While the decision expressed concern that the writ should not be expanded under the assumption that state courts did not have the same sensitivity to federal constitutional claims as did the federal courts, (428 U.S. at 493 n.35), footnote 31 strongly suggested that in the case where innocence is strongly implicated, the innocence/guilt value should override the policy of state autonomy.

The clearest and most direct method of how to inquire into the question of innocence is to ask whether there is sufficient evidence to prove each element of the crime beyond a reasonable doubt. If each element of the offense has not been so proven then the innocence/guilt determination of the state has been defective, and it is incumbent on the federal court through the mechanism of the writ of habeas corpus to insure that no one's liberty interests has been denied without due process of law. It was the individual person that the writ was developed to aid, and it is the individual who suffers in prison when the evidence was constitutionally insufficient for a conviction.

Following the reasoning of *Stone* v. *Powell*, certainly the federal courts should be mindful of too great an interference in the business of the state courts and that policy of comity should be followed in cases where the right infringed on is only collateral to the issue of guilt and innocence. However the allegation made by Petitioner Jackson that he was convicted of first degree murder when the Commonwealth of Virginia failed to meet its burden of proving his guilt beyond a reasonable doubt, can hardly be categorized as collateral. It goes directly to the heart of the issue of guilt and innocence and is properly the subject of the writ of habeas corpus.

The standard of whether a rational trier of fact could find a person guilty beyond a reasonable doubt

is certainly one familiar to the federal courts. For years under rule 29(a) of the rules of criminal procedure, the federal courts have been directed to acquit the accused "if the evidence is insufficient to sustain a conviction."

Until recently, a controversy existed among the United States Circuit Court of Appeals can the test to be applied when determining whether an acquittal was in order. Other than the United States Court of Appeals for the Second Circuit, the proper test was the one announced by Judge Prettyman in *Curley* v. *United States*, 160 F.2d 229 (D.C. Cir. 1947), cert. denied, 331 U.S. 837 (1947):

> If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make . . . .

The United States Court of Appeals for the Second Circuit developed its own test in a well-known opinion by Judge Learned Hand where he held that "the standard of evidence necessary to send a case to the jury is the same in both civil and criminal cases." *United States* v. *Feinberg*, 140 F.2d 592, 594 (2nd Cir. 1944), cert. denied 332 U.S. 726 (1944). Under this test the federal district courts within the Second Circuit did not take into consideration the reasonable

doubt standard in deciding whether an acquittal was in order. This so-called "Second Circuit" rule was finally overruled in *United States* v. *Taylor*, 464 F.2d 240 (2nd Cir. 1972). Thus, now all of the federal appellate courts and by inference all of the federal district courts now have an expertise to decide whether a rational trier of fact could find a defendant guilty beyond a reasonable doubt inasmuch as the federal district courts must apply essentially the same question in the context of rules of procedure whenever a defense attorney moves for acquittal.

The acceptance of the argument that the writ of habeas corpus is the proper mechanism for determining whether a rational trier of fact could have found the accused guilty beyond a reasonable doubt will not overly burden the federal judicial system. It is generally recognized that upon exhaustion of state remedies, prisoners often apply to the local federal district court for redress due to alleged violations of their constitutional rights. Many, if not most, are dismissed after the state files its motion to dismiss. An evidentiary hearing would rarely happen. This process would not essentially change by allowing federal courts through the means of a writ of habeas corpus to examine whether the evidence was not sufficient for a rational trier of fact to convict beyond a reasonable doubt. Should an inmate make the allegation, the government would need to do little more than to recite why there were grounds for the jury or judge to find the inmate guilty beyond a reasonable doubt. Most

cases could be easily dismissed. After giving the proper deference to the state by viewing the record in the light most favorable to the state *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), only those cases where a definite question of innocence is involved will be pursued. Given the policy beyond the issuance of the writ of habeas corpus, these are exactly the cases the federal district courts should investigate further.

II

NO RATIONAL TRIER OF FACT COULD HAVE FOUND THE PETITIONER GUILTY OF FIRST DEGREE MURDER BEYOND A REASONABLE DOUBT.

A. The Petitioner Was So Intoxicated On The Day Of Mrs. Cole's Death That He Was Incapable Of The Premeditation Required For A Conviction Of First Degree Murder.

As the Court stated in *Hannah* v. *Larche*, 363 U.S. 420, 442 (1960), "Due process is an elusive concept. Its exact boundaries are indefinable, and its context varies according to specific factual contexts." Applying the standards of law argued above to the "specific factual context" it is submitted that Petitioner Jackson was convicted of the crime of first degree murder when in fact the Commonwealth of Virginia failed to meet the burden established by the legislature. The one central fact that permeates the pages of the transcript is that Petitioner Jackson was extremely intoxicated at the time of Mrs. Cole's death and was probably in the same state the entire day. This conclusion can be gleaned from the testimony of a wide variety of witnesses whose integrity and judgment have never been questioned. Witnesses who testified included: (1) Sally Cole, the daughter-in-law of the deceased, who testified that by early afternoon of August 24, 1974 Petitioner Jackson had already consumed "several bottles" of alcoholic beverage [A. 42]; (2) Curtis Cole, the deceased's son, who remembered that between 2:30 and 3:00 p.m. of that same day, before purchasing an additional 12 cans of beer, Petitioner Jackson was "pretty well loaded" [A. 47]; (3) Deputy Sheriff Andrews, who was concerned with Petitioner Jackson's physical state between 6:00 and 7:00 p.m., when he observed his staggering footsteps and bloodshot eyes, that he advised the deceased to drive rather than allowing Petitioner Jackson to do so since the latter was "too drunk" to drive [A. 55]; and Petitioner Jackson who admitted sharing with Mrs. Cole, one fifth of Old Crow, one fifth of Wild Turkey, and undetermined amount of beer, and a pint of something else. [A. 59-60].

Commonwealth Exhibit Number 20 shows that at the time of her death Mrs. Cole had a blood alcohol level of 0.17%. According to a policy statement of the American Medical Association and the National Safety Council:

> 'Blood alcohol of 0.10% can be accepted as prima facie evidence of alcoholic intoxication, recognizing that many individuals are under the influence

> in the 0.05 to 0.10% range.' [A. Moenssens, R. Moses & F. Inbau, *Scientific Evidence in Criminal Cases*, 238 (1973)].

Therefore, if Mrs. Cole had at the time of her death a blood alcohol level well in excess of that level deemed to indicate intoxication, then surely Petitioner Jackson was at least as intoxicated as she. This can be inferred from the testimony of Deputy Sheriff Andrews when he stated that "[t]hey had been drinking. I would say Mr. Jackson had more than Mrs. Cole, it appeared to be that way." [A. 52]. It is thus safe to say that Petitioner Jackson, after drinking the entire day, was plainly very intoxicated.

As has already been noted the Commonwealth of Virginia recognizes that a mind may be so bewildered from intoxicating beverages as to be entirely incapable of premeditation. From all the evidence before this Court, it is apparent that Petitioner Jackson was in such a state of intoxication that he was incapable of a premeditated murder.

Even the Chief Prosecutor, Oliver D. Rudy argued for a conviction of second degree murder since he felt that there was not "evidence that would lift it above that." [Tr. 112]. In particular he was disturbed by the intoxication of Petitioner Jackson at the time of Mrs. Cole's death. [A. 113]. The judge of his own volition raised the conviction to first degree murder after noting that Petitioner Jackson had not been arrested for being drunk in public by either of the two police officers or the deputy sheriff. [Tr. 116]. This can be explained by the latter's testimony when he admitted that he wanted to get Mrs. Cole and Petitioner Jackson out of the diner in order that he could eat his meal without their presence. [A. 53-54]. Certainly if he had arrested Petitioner Jackson this would have disrupted his meal even further than his short discussion outside. The other two police officers apparently had little contact with either Mrs. Cole or Petitioner Jackson.

B. The Other Facts Of The Case Do Not Show Evidence Of Premeditation Such That A Rational Trier Of Fact Could Have Found Guilt Beyond A Reasonable Doubt.

Admittedly the events at the death scene sound bizarre as related by a man whose intoxication at the time was substantial. The statement given by Petitioner Jackson shows two individuals in a drunken stupor who quarreled over whether they would have sexual relations. A knife appeared and then a gun. After an ensuing struggle Mrs. Cole was shot. Certainly, if one was intoxicated the number of shots, whether one or two, is irrelevant.

It is clear that the deputy sheriff, a trained law enforcement officer, was not alerted to any circumstances or innuendos which would have caused him to think that the gun and a knife he saw would be used violently by either person. The fact that Mrs. Cole laughed when Petitioner Jackson mentioned having

sex with her did not cause Deputy Sheriff Andrews to become alarmed to the slightest degree. If Petitioner Jackson had intended to force his intentions upon Mrs. Cole, he certainly would not have so freely shown the gun to the deputy sheriff, nor hinted that he and Mrs. Cole were going to have sexual relations.

C. That A Judge Rather Than A Jury Convicted The Petitioner Should Not Change The Fact That No Rational Trier Of Fact Could Have Found Him Guilty Beyond A Reasonable Doubt Of First Degree Murder.

Evidence introduced for the Commonwealth included several black and white, and one color, photographs of the body of the deceased at the discovery site. [A. 56-57]. The court, in hearing final arguments from both the Commonwealth and the Defense, began to propound on behalf of a conviction for murder in the first degree. [Tr. 112-114]. When the defense insisted that intoxication mitigated any specific intent to commit premeditated murder, the Honorable Judge Ernest P. Gates replied, referring to the photographs of the semi-nude body of Mrs. Cole:

> The Court: Did you see the picture of her face and the mutilation? [Tr.115].
>
> . . .
>
> The Court: Take a look at that picture again. To me it is a very horrible looking picture. [Tr.115].
>
> . . .
>
> The Court: Look at the face. [Tr.115].
>
> . . .

> The Court: Look where she was shot. [Tr.116].

The photographs, while not pleasant, could in no way be interpreted as *prima facie* evidence of premeditation. The "horrible looking picture" noted by Judge Gates obviously referred to the color photograph taken when the body was turned over from its face-down position. The natural state of decomposition, plus the insect and rodent markings on the face, doubtlessly had an emotional impact upon the court, already concerned by the fact that Mrs. Cole had befriended the Petitioner when he was released from jail. [Tr.114].

The photographs are indicative of violent death by gunshot wounds. The autopsy produced no other extreme bodily contusions that would point to premeditation on the part of Petitioner Jackson. It is submitted that trial court was swayed by the unpleasant aspects of the photographs, and erroneously interpreted the natural state of the corpse. The judge extrapolated conclusions from the photographs which were contrary to all evidence as produced by the coroner's examination.

Mrs. Cole, after a spat, persuaded Petitioner Jackson to get back into the car with her and then drove the two of them to the secluded church. What resulted later was the result of a drunken stupor. The events of August 24, 1974 did not reveal sufficient evidence of premeditation to convict Petitioner Jackson of murder of the first degree beyond a reasonable doubt.

In The

Supreme Court of the United States

No. 78-5283

JAMES A. JACKSON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA AND R. ZAHRADNICK, WARDEN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

Va. Code Ann. § 18.2-32 (1975) provides as follows:

> "Murder, other than capital murder, by poison, lying in wait, imprisonment, starving, or by any willful, delib-

erate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, robbery, burglary or abduction, except as provided in § 18.2-31, is murder of the first degree, punishable as a Class 2 felony.

All murder other than capital murder and murder in the first degree is murder of the second degree and is punishable as a Class 3 felony."

QUESTIONS PRESENTED

I. Whether The Present Federal Habeas Standard For Reviewing The Sufficiency Of Evidence Supporting State Convictions Which Requires Some Evidence Should Be Rejected In Favor Of A Reasonable Doubt Standard.

II. Whether Jackson's Conviction Is Supported By Evidence Sufficient To Satisfy Due Process Standards.

III. Whether Jackson Should Be Resentenced For Conviction Of Second Degree Murder If The Evidence Is Deemed Insufficient To Support A First Degree Murder Conviction.

STATEMENT OF THE CASE

James A. Jackson (Jackson) was convicted of the first degree murder of Mary Houston Cole in the Circuit Court of Chesterfield County, Virginia. After exhausting his state court remedies, Jackson filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia. The District Court granted the writ, holding that the evidence was insufficient for conviction because the record was entirely devoid of evidence of premeditation. The United States Court of Appeals for the Fourth Circuit, applying the same standard of review, reversed the District Court.

At Jackson's trial, the evidence indicated that on the day of the killing Jackson had engaged in target practice and was in possession of a revolver just before the shooting. Investigating police officials testified that Jackson admitted the killing, although insisting it was in self-defense. Several shots were fired at the scene of the crime, two of which entered the body of the victim. Evidence at trial, further, revealed that just prior to the killing Jackson and the victim intended to have sexual relations. There was also evidence that both Jackson and the victim had been drinking before the shooting.

SUMMARY OF THE ARGUMENT

I.

Proof of guilt beyond a reasonable doubt is constitutionally required to convict an individual of a crime in a state court. *In re Winship,* 397 U.S. 358 (1970).

The standard of review of state court convictions in federal habeas proceedings is whether there is some evidence supporting the conviction. *Thompson* v. *Louisville,* 362 U.S. 199 (1960). *In re Winship* did not require any change in the constitutional standard of review of state convictions in federal habeas proceedings.

Important practical concerns of effective use of judicial resources, finality of state criminal processes, minimizing federal-state judicial friction, and the doctrines of comity and federalism all require that federal habeas corpus review not be expanded by way of a reasonable doubt standard of review.

II.

Whether the standard of *Thompson* v. *Louisville* is applied, requiring some evidence to support the conviction, or

a reasonable doubt standard is applied, Jackson's conviction of first degree murder is supported by evidence sufficient to satisfy either standard.

III.

Should the Court determine that Jackson's conviction of first degree murder is not supported by evidence as required by applicable due process standards, the case should be remanded to the state court for resentencing since Jackson has not attacked the sufficiency of the evidence for a conviction of second degree murder, a lesser included offense.

ARGUMENT

I.

Where A Federal Habeas Corpus Petitioner Challenges The Sufficiency Of Evidence Supporting A State Court Conviction The Appropriate Standard Of Review Is Whether There Is Any Evidence To Support Conviction Announced In Thompson v. Louisville.

A.

THE DECISIONS OF THIS COURT ESTABLISH THE THOMPSON STANDARD AS THE APPROPRIATE FEDERAL REVIEW STANDARD.

Proof of guilt beyond a reasonable doubt has been the recognized constitutional standard required for criminal conviction before the trier of fact. *Miles* v. *United States,* 103 U.S. 304 (1881); *Davis* v. *United States,* 160 U.S. 469 (1895); *Leland* v. *Oregon,* 343 U.S. 790 (1952); *In re Winship,* 397 U.S. 358 (1970). The issue presented by this case does not call into question this universally accepted principle.

The vital importance of the reasonable doubt standard in criminal trials has been its function of reducing the risk of convictions based upon factual error. *In re Winship,* 397

U.S. 358, 375. The efficacy of this standard in eliminating erroneous convictions has been expressly recognized by the decisions of this Court. *Patterson* v. *New York,* 432 U.S. 197, 208 (1977); *In re Winship, supra,* at 372. Certainly this consideration supports the conclusion that the Commonwealth urges in this case—that federal courts reviewing state convictions challenged on sufficiency of the evidence grounds should limit their inquiry to whether there was some evidence supporting conviction.

The Commonwealth does not ask that the Court apply any new standard of review; instead, we urge that the settled standard of *Thompson* v. *Louisville,* 362 U.S. 199 (1960) is applicable here. *Thompson* held that on certiorari review of a Kentucky conviction this Court would determine only whether the conviction was supported by some evidence:

> "The ultimate question presented to us is whether the charges against petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment. Decision of this question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all." 362 U.S. at 199.

The *Thompson* rule was reaffirmed in *Garner* v. *Louisiana,* 368 U.S. 157 (1961) and *Shuttlesworth* v. *Birmingham,* 382 U.S. 87 (1965). The same standard has been widely applied and generally understood as the appropriate standard of review by the federal courts of appeal throughout the country. *Grieco* v. *Meachum,* 533 F.2d 713, 721 (1st Cir. 1976), *cert. den. sub. nom.; Cassesso* v. *Meachum,* 429 U.S. 858 (1976); *Cunha* v. *Brewer,* 511 F.2d 894, 898 (8th Cir. 1975), *cert. den.* 423 U.S. 857 (1975); *United States ex rel. Horelick* v. *Criminal Court of N.Y.,* 507 F.2d 37, 40 (2d. Cir. 1974);

Crow v. *Eyman,* 459 F.2d 24, 25 (9th Cir. 1972), *cert. den.* 409 U.S. 867, *reh. den.* 409 U.S. 1029 (1972); *United States ex rel. Johnson* v. *Illinois,* 469 F.2d, 1297, 1299 (7th Cir. 1972), *cert. den.* 411 U.S. 920 (1972); *Holloway* v. *Cox,* 437 F.2d 412, 413 (4th Cir. 1971). Thus, it is well settled that in federal habeas corpus review of petitions claiming that a state conviction rests on insufficient evidence the relevant inquiry is whether any evidence supports the conviction. *Thompson, Garner, supra.*

Jackson offers no persuasive authority supporting his contention that a reasonable doubt standard is constitutionally required in federal habeas review. His reliance upon *In re Winship* is entirely misplaced. *Winship* dealt with the constitutional requirements of proof at trial and did not establish a standard for federal review of state convictions. 397 U.S. 358, 359. Contrary to the suggestion in Jackson's brief, *Winship* did not announce any new constitutional requirement in holding that proof at trial required proof beyond a reasonable doubt. *Winship, supra,* at 361-362; *Patterson* v. *New York,* 432 U.S. 197, 211 (1977). Thus, due process had required proof beyond a reasonable doubt at trial when *Thompson* v. *Louisville* established the rule that, in federal review of a state conviction, due process required only some evidence of guilt to uphold the conviction. *Winship* did not, as Jackson contends, alter due process requirements at trial and thereby necessitate change in the federal standard of review applied to state convictions. *Thompson* itself reveals that while due process may require proof beyond a reasonable doubt for state conviction, federal constitutional review of state convictions need not apply the same evidence standard.

B.

THERE ARE SOUND POLICY REASONS FOR APPLICATION OF THE THOMPSON STANDARD.

Jackson urges the Court to reject *Thompson* and expand the scope of federal habeas corpus review to inquire whether state convictions are founded upon evidence of guilt beyond a reasonable doubt. Cogent reasons for rejecting this invitation are set forth in the decisions of this Court.

In *Schneckloth* v. *Bustamonte,* 412 U.S. 218 (1973) Mr. Justice Powell discussed important and basic values to be considered in determining the proper bounds of federal habeas corpus review. 412 U.S. 218, 259. They include (i) the most effective use of limited judicial resources, (ii) the finality in criminal trials, (iii) minimizing friction between federal and state judicial systems, and (iv) the doctrine of federalism. Adoption of the reasonable doubt standard of review as Jackson suggests runs counter in effect to each of these important considerations.

Limited judicial resources will not be most efficiently used if the federal courts are saddled with the identical task the state courts are required to perform. Noting that most federal habeas corpus claims have been previously raised in state courts, Mr. Justice Powell succinctly said in *Schneckloth,* "if a job can be well done once, it should not be done twice." 412 U.S. 218, 259. The wisdom of this reasoning is even more compelling when applied to due process claims that a conviction is not supported by sufficient evidence. While other types of constitutional claims may not have been raised in the state courts through appeal or habeas corpus proceedings, every conviction necessarily involves a finding of guilt beyond a reasonable doubt. *In re Winship, supra.* Duplication of judicial effort is, therefore, the automatic result of adopting the reasonable doubt standard of review.

There can also be expected a growth in the number of habeas corpus petitions filed disproportionate to their merit.[1]

Adoption of the reasonable doubt standard by federal courts in habeas review would extinguish any finality that presently attends the state criminal process. The degree of finality which now obtains in a state court finding on the evidence exists largely because of the different standard of review applied in federal habeas proceedings. Elimination of the distinction between these standards eliminates virtually all finality to state convictions. Under the *Thompson* rule presently applied a reasonable balance is struck between societal interests in finality of criminal proceedings and the constitutional guarantee that an individual will not be illegally incarcerated.

Societal interest in the finality of state criminal proceedings has not been lightly assessed by this Court. It was deemed sufficiently important to bar a prisoner's habeas corpus claim that his conviction rested upon an illegally obtained confession because the prisoner had failed to comply with a contemporaneous objection rule in the state courts. *Wainwright* v. *Sykes,* 433 U.S. 72 (1977). The interest in finality does not, in the context of this case, require as in *Wainwright* the barring of a constitutional claim entirely, since the present rule of *Thompson* clearly allows federal habeas review of the evidence supporting state convictions. We strongly

[1] Federal habeas corpus review is not a small matter of concern to either the Federal Courts or the States. The number of Petitions filed in Federal District Courts by State prisoners increased from 127 in 1941 to 1,232 in 1962, as pointed out by Mr. Justice Clark in his dissent in *Fay* v. *Noia,* 372 U.S. 391 (1963). His prediction that a rash of new applications would follow the decision was certainly borne out by that fact that the number of Petitions had risen to 9,063 in 1970, and while they thereafter declined, they began to increase again in 1978 to 7,033. 1978 Annual Report of the Director, p. 76.

urge, however, that the assertion of constitutional claim should not be reviewed under a standard which obliterates the societal interests in finality. The present balance fostered by the *Thompson* rule is appropriate.

Moreover, the adoption of the reasonable doubt standard in federal habeas review can do little to reduce friction between the federal and state judiciaries. Allowing federal habeas review to become, in effect, a duplicative assessment of the trial evidence invites conflicting federal and state conclusions. Broad and repetitive federal oversight "renders the actions of state courts a serious disrespect in derogation of the constitutional balance between the two systems." *Schneckloth, supra;* Powell J. concurring, 412 U.S. at 263.

Adoption of the reasonable doubt standard would threaten the principles of federalism as laid down by our founding fathers. It would depreciate the dignity of the administration of justice by the separate states. The state Supreme Courts would be reduced to a position of absolute inferiority to all federal courts. What incentive would there then be for state judges to take scrupulous care that procedural fairness obtained in their courts if it were guaranteed that whatever were done would be second-guessed by a federal judge? Indeed, adoption of a reasonable doubt standard would ultimately make the federal courts the triers of fact in every criminal case. Are they any better equipped to measure the degrees of truth and to make the judgment leaps necessary in assessing evidence than are state trial courts? We say not.

Comity and federalism interests include, among other things, a "respect for state functions, a recognition of the fact that the entire Country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions . . ." *Younger* v. *Harris,* 401 U.S. 37, 44 (1971). To

establish federal habeas corpus as a *de novo* review of the evidence in state criminal proceedings is the antithesis of the doctrines of comity and federalism. Federal-state relations have been a significant concern in delineating the proper function of federal habeas corpus review. *Wainwright* v. *Sykes,* 433 U.S. 72, 89-90 (1977); *Francis* v. *Henderson,* 425 U.S. 536, 542 (1976).

In its present form federal review assures that due procedural regard is given in every state case and that the correct judicial tests measuring guilt and innocence are employed. But how can the federal courts, with economy and except at the cost of grevious damage to "Our Federalism," retry every state judgment? To change the standard here, in the face of the passionate appetite of convicted criminals to seek federal review, would only further burden the federal and state judicial machinery. The "cult of appeals" already strains our systems and gives rise to public cynicism that cases never end. To make federal review more rigorous would also impose increased and costly burdens on the state Attorneys General. Moreover the state trial stage of criminal proceedings would seem to count very little in the eyes of offenders and the public.

II.

Petitioner's Conviction Was Supported By Evidence Sufficient To Satisfy Due Process Of Law Under Either Standard.

The evidence presented at Jackson's trial proved his guilt of first degree murder beyond a reasonable doubt. His claim that he was denied due process is, therefore, unfounded.

At Jackson's trial, Gloria Farmer, Mrs. Cole's daughter, testified that her mother arrived home on August 24, 1974, at approximately 2:30 in the afternoon. She testified that

her mother then went to the grocery store and returned, with a six pack of beer. (App. 37.) She recalled that her mother left the house after supper and said she "might go to Carolina. . . ." At this point she estimated that her mother may have consumed two or three cans of beer. (App. 40.)

Sally Cole, Mrs. Cole's daughter-in-law, testified that on the date of the offense, she saw Jackson and her husband with a pistol target shooting. (App. 41-42.) She recalled that Jackson had been drinking that day since morning. (App. 42.) She testified that he had gone to a grocery store and bought twelve cans of beer. (App. 43-44.) Mrs. Cole had then come to the house, Jackson had gotten in the car with her, and they then left. She testified that Mrs. Cole was driving, and that she heard no argument between them. (App. 44.)

Mrs. Cole's son, Curtis Cole, testified that on the day of the offense he drove Jackson to the grocery store where he bought twelve cans of beer. (App. 48.) He further said he knew that Jackson had a pistol that day. (App. 47.) He testified that Jackson was "pretty well loaded" on the day of the offense. (App. 47.)

David A. Andrews, Deputy Sheriff, testified that Mary Cole had been a cook at the Chesterfield County Jail and that he had seen Jackson and her on several occasions talking at the jail. (App. 50.) He further recalled that on the date of the offense, he saw both Mrs. Cole and Jackson at the Chesterfield Diner shortly before her death. (App. 50.) Both had been drinking but Jackson appeared to have had more to drink. (App. 52.) Jackson staggered slightly and his eyes were bloodshot. (App. 52.) He also remembered that Jackson had shown him a revolver. (App. 52.) He said that he saw a knife in the front seat of Mrs. Cole's automobile and that he had suggested that Mrs. Cole drive because he thought she was better able to do so than Jackson. (App.

53.) But he did not however, conclude that Jackson was sufficiently drunk to arrest him for public drunkenness or to prevent him from leaving with his revolver. He stated that when the two were leaving the Diner, Jackson indicated that he and Mrs. Cole were going to have sexual relations and that Mrs. Cole "smiled and left and just laughed." (App. 56-57.)

Detective Mark Wilson testified that he investigated the offense and saw the victim's body before it had been removed from the scene of the crime. (App. 56-57.) He took photographs of the victim, one of which showed the victim clad only from the waist up. (App. 57.) Another photograph showed six shell casings approximately 8 feet from the body. (App. 57.)

Detective Wilson later obtained a statement from Jackson stating that Mrs. Cole had come to the place where he then was living in her car. Mrs. Cole asked him to go riding with her and the two of them drove to the Chesterfield Diner. (App. 58.) They had a sandwich and a cup of coffee and had walked back to the car, where they "had a few words, you know, arguing and she tried to stab me with a knife." (App. 58.) He stated that he pushed her back and hit her. He then went over to a grocery store and called a taxi. Mrs. Cole then drove up and asked him to ride with her. (App. 58.) Jackson stated that he got into the car and they drove to a church. He recalled that "we got messing around and she said that she wanted to have sex with me" and he had refused. (App. 58.) He further stated that she became angry and tried to stab him again and that he shot in the ground but that she kept trying to stab him. (App. 58.) He then stated that he loaded the gun and told her that he didn't want to have anything to do with her and that she threw the knife down and tried to take the gun from him. He then stated, "that's where it happened." (App. 58.) Mrs. Cole,

he said, tried to take the gun and that the gun "went off." (App. 58.) He said he then became panicky and drove to North Carolina. Later he went to Florida but had returned again to North Carolina.

When asked whether the victim had cut him when she swung at him with a knife, Jackson did not answer. (App. 59.) Jackson told police that he had drunk one-fifth of Old Crow, one-fifth of Wild Turkey, and a pint of something else. (App. 59-60.) But he further stated that the victim had drunk "half of the whiskey" and that they had bought two six packs of beer. (App. 60.) He described himself as "pretty high." (App. 60.) He stated that the victim was "almost drunk." (App. 60.) Jackson stated that he shot five times into the ground before he reloaded and the fatal shot was fired. (App. 60.)

Cleon Maeur, a firearms expert, testified that the revolver which was found in Jackson's possession was the same which fired the cartridge casings found at the scene of the crime, in the car, and at the site where target practicing had occurred. He also testified that there were two holes found in the clothes of the victim and that they were caused by bullets "fired from a firearm having a muzzle distance of approximately one inch from the garment. . . ." (App. 63.)

In The Commonwealth of Virginia, a necessary element of every offense of murder is that of malice. *Coleman* v. *Commonwealth,* 184 Va. 197, 35 S.E.2d 96 (1945); *Davis* v. *Slayton,* 353 F.Supp. 571 (W.D. Va. 1973); 10A *Va. and W.Va. Digest,* Homicide, § 11 (1972). But, if, in addition to malice, there is deliberation and premeditation, the offense is first degree murder. *Hairston* v. *Commonwealth,* 217 Va. 429, 230 S.E.2d 626 (1975); *Akers* v. *Commonwealth,* 216 Va. 40, 216 S.E.2d 28 (1975); *Perkins* v. *Commonwealth,* 215 Va. 69, 205 S.E.2d 385 (1974); *Painter* v. *Commonwealth,* 210 Va. 360, 171 S.E.2d 166 (1969); and *Shiflett* v.

Commonwealth, 143 Va. 609, 130 S.E. 777 (1925).

Premeditation need not exist for any particular length of time and may be formed at the moment of the commission of the act under Virginia law. *Commonwealth* v. *Brown,* 90 Va. 671, 19 S.E. 447 (1894); *Shiflett* v. *Commonwealth, supra.*

First degree murder is defined by statute, as follows:

> "[m]urder other than capital murder, by poison, lying in wait, imprisonment,, starving, or by any willful, deliberate, and premeditated killing. . . ." (Va. Code Ann. § 18.2-32).

Premeditation was thus a specific element of the crime of first degree murder which the Commonwealth was required to prove beyond a reasonable doubt. *In re Winship, supra.*

In Virginia, it has long been the law that intoxication may be such as to destroy premeditation, thus making a defendant liable for conviction only of second degree murder. *Hatcher* v. *Commonwealth,* 218 Va. 811, ... S.E.2d ..... (1978); *Drinkard* v. *Commonwealth,* 165 Va. 799, 183 S.E. 251 (1936); and *Little* v. *Commonwealth,* 163 Va. 1020, 175 S.E. 767 (1934). Thus, the Commonwealth had the burden under its own laws to prove the element of premeditation beyond a reasonable doubt notwithstanding any evidence of Jackson's intoxication.

Under the applicable *Thompson* standard there must be "some" evidence to support Jackson's conviction of first degree murder. There was unquestionably evidence of premeditation on Jackson's part. He was armed with a pistol on the day the offense was committed. There was evidence that he had been target shooting that day. The victim was shot twice, both shots having been fired at close range. Moreover, several other shots were fired at the scene of the crime.

The victim was clothed only from the waist up. Jackson had stated before the offense occurred that he intended to have sexual relations with the victim. Although it is true that there was no direct evidence that Mrs. Cole refused his sexual advances, in view of all the evidence, there was clearly a sufficient basis for a finding of premeditation.

Further, assuming the reasonable doubt standard urged by Jackson is applicable, there is sufficient evidence of premeditation to meet such a standard. The same evidence mentioned previously was sufficient to prove premeditation beyond a reasonable doubt.

Jackson's self-defense contentions centered on his statement to police that the victim had attempted to force herself upon him sexually and that he fired the shots in self-defense when she attempted to stab him after he refused her advances. This evidence was unpersuasive in view of the testimony that Jackson was the one who mentioned sexual intentions before leaving the diner with Mrs. Cole. Moreover it obviously strained the court's credulity to believe that Jackson could first shoot several times and then reload a gun while Mrs. Cole was trying to stab him. It is equally unlikely that she stood idly by while he reloaded, or that the gun "went off" twice, or that only after the gun was reloaded did she try to take it away from him. Jackson's statement to police was, in short, not believable in light of all the countervailing evidence. The clear indication of premeditation was not negated by this evidence.

Jackson also argues that he was intoxicated so as to make premeditation impossible. The trier of fact was the ultimate judge of the totality of the evidence and was fully able to judge the defense of intoxication. Jackson's own statement that he was able to reload his gun while managing to defend himself from Mrs. Cole's attack; his memory of details surrounding the shooting which indicated his mental ability and

alertness; and the Deputy Sheriff's apparent belief that Jackson was sufficiently sober, just before the shooting, to be able to travel with a revolver, all suggest that the intoxication defense was unpersuasive. The Court's rejection of the intoxication defense was a sound judgment.

In conclusion, whether the standard of review applicable to the instant case is to be that requiring "some" evidence of premeditation, or of proof beyond a reasonable doubt, the Commonwealth submits that either test has been satisfied.

III.

If Evidence Of Premeditation Was Insufficient For Conviction, Petitioner's Case Should Be Remanded To The State Courts For Resentencing.

In *Burks* v. *United States,* ..... U.S. ..... (June 14, 1978), this Court held that the Double Jeopardy Clause prohibits retrial of persons whose conviction had been reversed on appeal for insufficiency of the evidence.

In *Greene* v. *Massey,* ..... U.S. ..... (June 14, 1978), the appellant had been convicted in Florida of first degree murder. The Florida Supreme Court reversed the conviction without clearly stating its reasons and ordered a new trial. This Court, however, relying upon *Burks, supra,* stated that such retrial would violate Due Process of Law if reversal was based upon insufficiency of the evidence. Because of lack of clarity as to why the conviction had been reversed, the case was remanded for further proceedings, this Court, noting that:

> "Given our decision today to remand this case for reconsideration by the Court of Appeals, we need not reach the question of whether the State could, consistent with the Double Jeopardy Clause, try Greene for a lesser-included offense in the event that his first-degree murder conviction is voided." ..... U.S. ....., at p. ....., n. 7.

Under Virginia criminal statutes, premeditation is a necessary element of first degree murder. *See* Va. Code Ann. § 18.2-32, *infra,* p. 1. Murder in the second degree is a lesser-included offense of murder in the first degree. Since Jackson has not attacked the sufficiency of evidence relating to elements of second degree murder, if it is determined by this Court that the evidence was insufficient for conviction of first degree murder, the case should be remanded to the state courts for resentencing on second degree murder.

CONCLUSION

The present standard of federal review of state criminal convictions, requiring some evidence to support the conviction, should not be altered to require evidence beyond a reasonable doubt.

The evidence of Jackson's guilt of first degree murder satisfies either standard.

If Jackson's conviction of first degree murder is not supported by the evidence, his case should be remanded to the state court for resentencing for second degree murder.

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
and
R. ZAHRADNICK, *Warden*

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CERTIFICATE OF SERVICE

I, Marshall Coleman, Attorney General of Virginia, and a member of the Bar of this Court, do hereby certify that three printed copies of the foregoing Brief of Respondents were mailed, postage prepaid, this 15th day of February, 1979, to Carolyn J. Colville, Esquire, Colville and Dunham, 2 North First Street, Richmond, Virginia 23219, Counsel for Petitioner.

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

TO GIVE SUBSTANCE TO THE HOLDING OF *IN RE WINSHIP*, IT WAS THE DUTY OF THE FEDERAL COURTS TO MAKE A DETERMINATION OF WHETHER A RATIONAL TRIER OF FACT COULD HAVE FOUND THE PETITIONER GUILTY OF FIRST DEGREE MURDER BEYOND A REASONABLE DOUBT.

B. The Court of Appeals Was Incorrect in Its Determination That *Thompson* v. *City of Louisville* Was the Proper Rule to Follow in Granting or Denying the Writ of Habeas Corpus.

The State of California in its amicus curiae brief in support of respondent put great weight on the argument that this Court has not specifically held that the standard of *In re Winship* should be available in federal collateral review, despite the opportunity to do so in the case of *Vachon* v. *New Hampshire*, 414 U.S. 478 (1974). However, in *Vachon* v. *New Hampshire* this Court was not presented with the question of whether a higher standard of evidence was required under the due process clause. Given that the question was not presented to this Court, it is hardly surprising that this Court did not announce that standards other than those set forth in *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960), could also violate due process. As the Court said in *Hankerson* v. *North Carolina*, 432 U.S. 233, 241 (1977): " 'We do not reach for constitutional questions not raised by the parties.' " [quoting from *Mazer* v. *Stein*, 397 U.S. 201, 206 n.5 (1954)].

C. When a State Convicts a Person on Proof Less Than What the Legislature Requires, the Federal System Is Empowered to Intrude Into the Affairs of the State to Protect the Federal Interest Involved in That Individual Case.

The respondents and amici curiae have laid great emphasis on three cases: (1) *Estelle* v. *Williams*, 425 U.S. 501 (1976); (2) *Francis* v. *Henderson*, 425 U.S. 536 (1976); and (3) *Wainwright* v. *Sykes*, 433 U.S. 72 (1972). The cases were cited by them to illustrate alleged policy reasons why *In re Winship*, 397 U.S. 358 (1970), should not be available in federal collateral review.

The statements found in these cases emphasize a healthy respect for the state court system. They should be understood in the framework of a defendant represented by counsel who has foregone the opportunity to raise his constitutional claim at the state court level. Crucial to this "waiver" approach is the theory that once the defendant retains or it appointed counsel, the defendant exercises free choices and is bound by the choices he makes. In this framework, considerations of certainty, finality, and efficiency are valid.

However, unlike the petitioner in *Estelle* v. *Williams*, who did not object to the wearing of prison

apparel at his trial, or the petitioner in *Francis* v. *Henderson*, who did not object to the racial composition of the grand jury at his trial, or the petitioner in *Wainwright* v. *Sykes*, who did not object to the admissibility of his confession at his trial, Petitioner Jackson did not waive the argument that his conviction was contrary to the law and evidence. Both at the trial court [Tr. 125] and at the Supreme Court of Virginia [Brief of Amicus Curiae - State of California A.1-10] Petitioner Jackson's court-appointed lawyer, Mack T. Daniels, argued that the judgment of the trial court should be set aside as contrary to the law and evidence. This meant simply that the evidence was lacking to sustain the conviction. Certainly then, the principle of insufficient evidence to sustain the conviction was not waived in the state courts.

Since Petitioner Jackson's rights have not been waived in the state courts, his rights under the writ of habeas corpus are intact. Respondent and amici curiae put forth broad policy arguments to suggest that Petitioner Jackson should not be afforded the fundamental principle of justice, i.e., fairness to the individual before the court. We submit that there is, indeed, a broad issue at stake here. That issue involves innocence and equity.

The relief afforded by the writ of habeas corpus is of immeasurable value when weighed in the scales of justice. Any possible deleterious effect upon a federal or state criminal justice system must be compared to the benefits to any one person whose liberty has been

unlawfully restrained. Briefs filed by the respondent and its amici curiae have expressed generalized and unfounded fears at what they feel would be an unjustified intrusion into the state courts and their autonomy.

To summarize, the respondent and the amici curiae have stated that extension of the principles of the writ of habeas corpus to the standards of *In re Winship* would cause the following harms: a) place undue burdens upon the federal courts; b) cause a lack of finality of state judgments; c) create friction between state and federal courts; d) disregard principles of comity; e) create duplicity in review of cases; f) interfere with punishment and rehabilitation of state prisoners; g) interfere with the orderly administration of justice; and h) force review by transcript alone. We submit that the states have placed their fears above what should be their primary concern, i.e., the ultimate ideals of justice and fairness. For, "[the writ] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose - the protection of individuals against erosion of their right to be free from wrongful restraint upon their liberty." *Peyton* v. *Rowe*, 391 U.S. 54, 66 (1968) [quoted from *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963)].

The federal courts, as do all courts, function at the behest of the goals of justice. If this duty places a heavy burden upon or causes friction between federal and state systems, this problem must be resolved in

favor of fundamental fairness for the individual. Comity principles also must be set aside to protect that one person whose rights may have been abridged. Duplicity of review will serve as a safeguard to the rights of the individual. It is understood generally that convictions are appealed every day by the thou sands from lower to higher state and federal courts. Thus, finality of state court judgments occurs only when every avenue of appeal has been exhausted. While those avenues of appeal are being explored, few state prisoners wander the streets as free men or women. Punishment and hypothetical rehabilitation normally continue throughout an appeal process.

The orderly administration of justice has survived both the extension and the diminution of the scope of the writ of habeas corpus. It will survive, and should not be permitted to override, the expansion of the rights of the individual. State appellate courts have used, as a matter of course, transcripts to review lower court judgments. There is no reason why federal courts cannot, as do state appellate courts, review transcripts. Should it happen, as has been suggested by respondent and amici curiae, that prisoners would wait until witnesses are no longer available before challenging a conviction, it can be countered that these same prisoners may have spent undeserved years in prison before grounds for an appeal surfaced.

The court system, the law, and its institutions must progress toward that ultimate goal, fairness. Thus, a federal question has been raised when fundamental

fairness is an issue. [*Grondler* v. *North Carolina*, 283 F.2d 798, 802 (4th Cir. 1960)]. No matter what the objections raised by respondent, from the broad aegis of state's rights to the picayune matter of review by transcript, the courts must never lose sight of the fact that individual rights must never be trammeled in the stampede of an ironclad system. We submit that the writ of habeas corpus, as "both the symbol and the guardian of individual liberty" [*Peyton, supra* at 58] should be extended to allow review of convictions which have not been proven beyond a reasonable doubt.

This is why the matter of innocence as an issue before the Court is so important to Petitioner Jackson. The broad state considerations outlined above do not stand on equal footing with the question of innocence. This is readily apparent in the decision *Stone* v. *Powell*, 428 U.S. 465 (1976) where in footnote 31 of pages 491-2 this Court stated: "Resort to habeas corpus especially for purposes *other than to assure that no innocent person suffers an unconstitutional loss of liberty*, results in serious intrusions on values important to our system of government." [emphasis added]. This footnote clearly expresses the view that where innocence is at stake, this fact should override the state interests found in *Estelle* v. *Williams*, *Francis* v. *Henderson*, and *Wainwright* v. *Sykes*, and broad policy arguments in the decision of granting or denying the writ of habeas corpus. As we argued in the brief filed on behalf of Petitioner Jackson, if he was

convicted of first degree murder when the evidence was insufficient, he is innocent of the charge for which he was convicted. Thus he falls squarely within the confines of footnote 31.

Therefore, since Petitioner Jackson has not waived his claim in the state court, and since he has made a colorable claim of innocence, the writ of habeas corpus should issue. Certainly the policy reasons argued by the respondents and the amici curiae should not override the fundamental fact that justice is but another facet of fairness, and that courts and their institutions seek to see that justice is done.

CONCLUSION

For the reasons set forth herein and set forth in the Brief For The Petitioner, the decision of the United States Court of Appeals for the Fourth Circuit should be reversed and the writ of habeas corpus should be issued. In the alternative, the case should be remanded to the appellate court with further instructions as to the applicable law in this case.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

No. 78-5283

JAMES A. JACKSON,

Petitioner,

v

COMMONWEALTH OF VIRGINIA and
R. ZAHRADNICK, Warden,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR AMICUS CURIAE STATE OF MICHIGAN

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR AMICUS CURIAE STATE OF MICHIGAN

INTEREST OF THE AMICUS CURIAE

This case involves, *inter alia*, the issue of the appropriate standard of review to be exercised by a federal court in habeas corpus proceedings challenging the constitutionality of state court convictions in which it is alleged that insufficient evidence was adduced to support each element of the crime charged. As counsel for the Michigan Department of Corrections and, therefore, for the wardens of the various penal institutions in Michigan, the Michigan Department of Attorney General deals on a daily basis with habeas corpus petitions filed by state prisoners, including many petitions which challenge the sufficiency of evidence adduced at state court trials.

As a matter of law, the issue in the instant case presents

important questions concerning the proper relationship of the states and the federal government in habeas corpus proceedings. Because federal habeas corpus proceedings involve collateral review of state court convictions which have been reviewed and affirmed within the state appellate court system, important questions are presented as to the weight to be accorded to state court findings of fact and conclusions of law. Important questions of comity, federalism and the finality of state court criminal convictions are also involved.

In addition to the important legal issues involved, this case has a significant practical impact upon the operations of state governmental agencies such as the Michigan Department of Corrections and the Michigan Department of Attorney General because of the ever-increasing flood of habeas corpus petitions filed by state court prisoners seeking to overturn their convictions. Any expansion of the issues cognizable in such proceedings will necessarily have a significant impact upon the workload of such agencies and upon the utilization of personnel and other resources.

Because of the importance of the issue presented in this case, the State of Michigan files this amicus curiae brief pursuant to United States Supreme Court Rule 42, in support of Respondent Commonwealth of Virginia.

ARGUMENT

IN FEDERAL HABEAS CORPUS PROCEEDINGS IN WHICH IT IS ALLEGED THAT INSUFFICIENT EVIDENCE WAS ADDUCED TO SUPPORT A STATE COURT CONVICTION, THE PROPER STANDARD OF REVIEW IS WHETHER THERE IS ANY COMPETENT EVIDENCE TO SUPPORT EACH ELEMENT OF THE CHARGED OFFENSE.

It is of course beyond dispute that a state court conviction unsupported by *any* evidence as to each element of the charged offense violates due process. *Thompson* v *City of Louisville*, 362 US 199 (1960). Furthermore, state court convictions must, as a matter of federal due process, be supported by proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. *In re Winship*, 397 US 358 (1970). Michigan law has, for many decades, supported the proposition that due process of law requires that a criminal conviction can only be obtained by evidence establishing guilt beyond a reasonable doubt. *People* v *Licavoli*, 264 Mich 643 (1933).

The *Winship* rule protects and promotes the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship, supra*, 397 US at 372 (Harlan, J., concurring). In *Winship* this court described the "vital role" that the reasonable doubt requirement plays in our criminal justice system, *In re Winship, supra*, 397 US at 363-364:

> "The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the

good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. As we said in Speiser v Randall [357 US 513, 525-526 (1958)]: 'There is always in litigation a margin of error, representing error in fact-finding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of persuading the fact finder at the conclusion of the trial of his guilt beyond a reasonable doubt.'"

Both *Thompson* v *Louisville, supra,* and *In re Winship, supra,* arrived in this Court on direct review (by certiorari and appeal, respectively) following state court proceedings. In such circumstances review of the sufficiency of evidence is fitting and proper because the important values enunciated in *Winship* must be protected not only at trial and upon direct appeal within the state courts, but also upon review of such convictions in this court by appeal or certiorari.

The State of Michigan as amicus curiae does not advocate retreat from the *Winship* principles when applied at state court trials, upon direct review within the state appellate system, and upon review by this Court by way of appeal or certiorari. We submit, however, that in the context of a collateral review of such a state court conviction by way of a federal habeas corpus proceeding, other considerations come into play which militate against permitting federal courts to re-evaluate the sufficiency of evidence sustaining a conviction, once that question has been afforded a full and fair review within the state court system.

To the extent that the question of sufficiency of evidence is constitutionally-based, it is within the power of federal

courts to consider the issue in habeas corpus proceedings, 28 USC §§ 2241, 2254. The important question in this case deals with the appropriate exercise of that power. In *Francis* v *Henderson,* 425 US 536, 538-539 (1976) in deciding that a state prisoner who failed to make a timely challenge to the composition of the grand jury that indicted him could not after his conviction bring that challenge in a federal habeas corpus proceeding:

> "There can be no question of a federal district court's power to entertain an application for a writ of habeas corpus in a case such as this. 28 USC §§ 2241, 2254. The issue, as in [*Davis* v *United States,* 411 US 233], goes rather to the appropriate exercise of that power. This Court has long recognized that in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forego the exercise of its habeas corpus power. [citation omitted]. The question to be decided is whether the circumstances of this case are such as to invoke the application of those considerations and concerns."

Francis, and the subsequent decision in *Wainwright* v *Sykes,* 433 US 72 (1977) support the proposition that not every constitutionally-based challenge to a state court conviction ought to be considered in a collateral challenge to that conviction in a federal habeas corpus proceeding.

Similarly, in *Stone* v *Powell,* 428 US 465 (1976) the court considered the question whether state prisoners who have been afforded the opportunity of a full and fair consideration of their reliance upon the exclusionary rule with respect to seized evidence by the state courts at trial and on direct review may invoke their claim again on federal habeas corpus review and concluded that the utility of the exclusionary rule was outweighed by the costs of extending the rule to collateral

review of such claims. This court noted, 428 US at 491, fn 31, that after such claims have been examined by two or more tiers of state courts, resort to habeas corpus may result in serious intrusions on values important to our system of government including,

> "(i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded."

In addition to the factors indicated in *Francis* v *Henderson, supra,* and *Stone* v *Powell, supra,* there are other considerations supporting the proposition that federal courts ought not to weigh the sufficiency of evidence supporting a state court conviction when that issue has been fully and fairly presented to the state courts for consideration upon direct review. It should, of course, be noted that most Circuit Courts of Appeals have followed the traditional rule that the sufficiency of evidence is not cognizable in federal habeas corpus proceedings. For example, in *Brooks* v *Rose,* 520 F2d 775, 777 (CA 6, 1975) the court said:

> "The general rule is that the sufficiency of evidence to sustain a conviction in a state court prosecution is not reviewable in a federal habeas corpus proceeding. [citations omitted]. However, a conviction which is totally devoid of evidentiary support as to a crucial element of the offense is unconstitutional under the Due Process Clause of the Fourteenth Amendment. [citations omitted]. Such a claim is reviewable in a federal habeas corpus proceeding.
>
> "• • •

> "The question before this Court is limited to whether the record contains any relevant evidence whatsoever to support the jury's finding. . . ."

Other arguments supporting the contention that the sufficiency of evidence ought not to be reviewed by federal habeas corpus courts are eloquently set forth in Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 Harv. L. Rev. 441 (1963). In that article Professor Bator notes that since federal courts have no more inherent ability to ascertain the "truth" of historical facts than a state court, the appropriate inquiry should be whether the arrangements used to find those facts and apply the law were adequate. 76 Harv. L. Rev. at 449. Professor Bator also enunciates several important societal values which are promoted by establishing the finality of state court convictions, 76 Harv. L. Rev. at 451-452: The conservation of economic, intellectual, moral, and political resources; promotion of the educational, deterent, and rehabilitative functions of the criminal law by insuring swift, certain and just punishment; and minimizing the implicit lack of confidence in state court adjudication if repeated relitigation of the same issue is routinely permitted.

So long as state court juries are properly instructed as to their function to determine guilt only upon proof of each element of the offense beyond a reasonable doubt and so long as state court review of convictions affords a full and fair opportunity to litigate the issue of the sufficiency of the evidence, there is simply no need to assume that federal courts in habeas corpus proceedings have any greater expertise to decide such purely factual questions which must, of course, depend upon such intangible factors as the credibility of witnesses' testimony. The deference which should be accorded to factfinding by a jury or trial court, was emphasized by this court in *In re Winship, supra,* 397 US at 364:

" 'Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the *factfinder* at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the *factfinder* of his guilt.' To this end, the reasonable-doubt standard is indispensible, for it 'impresses on the *trier of fact* the necessity of reaching a *subjective* state of certitude on the facts in issue.' " (emphasis added).

In *Stone* v *Powell, supra,* 428 US at 539, fn 35 this court acknowledged the competence of state courts as fair and competent forms for the adjudication of federal constitutional rights:

"Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts have a constitutional obligation to safeguard personal liberties and to uphold federal law."

Professor Bator has noted the incongruous results which might develop should the federal courts be permitted to reassess the sufficiency of the evidentiary basis for a state court conviction, 76 Harv. L. Rev. at 503, 508:

"But if the federal judge has an impeccable record before him, that is, he has no reason to believe that the factfinding processes of the state courts were in any way

inadequate to the task at hand, on what principle should he decide whether to exercise such a discretion? Note that if he does exercise it, he would seem to be completely free to disregard the state-court findings even though the issue may turn on an assessment of the veracity of witnesses; in such a case we have the startling result that a state prisoner is deemed to be held in violation of the Constitution of the United States because a state judge [or a jury] believed the prosecution's witnesses and the federal judge [reviewing a transcript of the state court proceedings] believes those of the defendant.

"• • •

"And to revert to the instance previously given, if a federal judge releases a prisoner because his opinion about the credibility of a witness differs from that of a state judge, that episodic difference of opinion cannot be sanctified into a great issue merely because the result is characterized as a ruling as to constitutional rights. Litigation about consitutional rights *may* raise issues of peculiar sensitivity and importance, but will not necessarily do so. The issue may involve simply the application of well-settled and well-understood principles to a highly particular and closely balanced set of facts with no further elaboration of the principles themselves being involved, and review may consequently consist of nothing more than second-guessing the ultimate leap of judgment involved. On the other hand, if the issue in the particular case really is important, it is the very purpose of the certiorari jurisdiction to provide direct Supreme Court review."

In summary the State of Michigan as amicus curiae submits that the federal courts can and should supervise, in habeas corpus proceedings, the fairness of the methods by which a state adjudicates claims of federal rights. The question in the instant case is whether the scope of review in such collateral

proceedings should be extended merely on the general premise that federal courts somehow provide better justice than state courts, in order to permit federal courts to reassess the sufficiency of evidence in cases where there is no reason to suspect less than full, fair and conscientious state court determination and review of that issue. The state of Michigan submits that a criminal defendant's constitutional right to proof beyond a reasonable doubt of each of the elements of the crime charged is adequately protected by proper jury instructions and review of convictions by state appellate courts and by this Court upon certiorari or appeal. Federal courts are no more competent to make better determinations of that issue than are the state courts and, because of the important state interests in finality and the proper administration of the criminal justice system, the sufficiency of evidence adduced at a state court trial should not be subject to reassessment in federal habeas corpus proceedings, so long as there is some evidentiary basis for each element of the offense charged.

CONCLUSION

For the reasons set forth above, the State of Michigan as amicus curiae respectfully submits that the decision of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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Dated: February 15, 1979

IN THE

Supreme Court of the United States

October Term 1978

No. 78-5283

JAMES A. JACKSON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE
IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The State of California has, as have most, if not all, of the other forty-nine states, provided state prisoners with an appellate review system for full and fair hearing of all federal constitutional law claims.

Therefore, amicus curiae is concerned that duplicative federal habeas jurisdiction may be expanded by constitutionalizing the reasonable doubt standard as applied to collateral review of sufficiency of the evidence. It is our opin-

ion that if the "any" evidence standard is replaced by a "reasonable doubt" standard every state prisoner who presented such an issue in his state appeal or on state collateral review will be likely to embrace the federal remedy.

The State of California has been authorized by the Attorney General of South Carolina, the Honorable Daniel R. McLeod; the Attorney General of the State of Alabama, the Honorable Charles A. Graddick; and the Attorney General of West Virginia, the Honorable Chauncey H. Browning, to inform the Court that these states join in this brief and support the position of the Commonwealth of Virginia.

SUMMARY OF ARGUMENT

Amicus curiae contends that the Due Process Clause does not require application of the "reasonable doubt" standard on federal habeas review and that relitigation of all constitutional issues, including whether the evidence is sufficient to comport with due process whatever the standard, should be limited to those cases where defendants did not enjoy a full and fair state hearing.

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ARGUMENT

I. DUE PROCESS DOES NOT REQUIRE FEDERAL RELITIGATION OF STATE SUFFICIENCY OF THE EVIDENCE ISSUES BY APPLICATION OF THE REASONABLE DOUBT STANDARD, THEREBY UNNECESSARILY EXPANDING FEDERAL HABEAS JURISDICTION

A. Federal Habeas Corpus Should Not Be Available To Relitigate Sufficiency Of The Evidence In A State Conviction Unless The State Failed To Provide A Full And Fair Hearing

The instant case arises via the broad federal habeas corpus avenue for state prisoners. It is now apparent that such relief should be limited when the value of the "Great Writ" is weighed against its deleterious effects on the federal-state criminal justice system. (See Stone v. Powell (1976) 428 U.S. 465, 488-489, 494.) On the negative side of the balance is the burden on federal district courts and circuit courts, the lack of finality of any state judgment (even after repetitive state reviews), friction between federal and state courts, a lack of comity, duplicity of review and interference with punishment and rehabilitation of state prisoners. On the positive side of the balance is the possibility that constitutional error, missed or ignored by the state court system, will be ferreted out. This solitary virtue has lost much of its vitality due to the greater competence of the state justice systems,

their increased sensitivity to enforcing federal constitutional rights as mandated in recent years by this Court, and their protection of basic rights by application of their state constitutions. Therefore, federal habeas corpus should again be limited to its essential function--to afford an effective remedy where otherwise there was none. (See White v. Ragen (1945) 324 U.S. 760; Stone v. Powell, supra, 428 U.S. 465.)

A brief review of the modern history of the writ indicates its current role is evolving and in need of further revision and definition.1/

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1. More elaborate discussions of the complete history, purpose and scope of habeas corpus are plentiful: Cover and Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court (1977) 86 Har.L.Rev. 1035-1059; Jaglom, Protecting Fundamental Rights in State Court: Fitting a State Peg to a Federal Hole (1977) 12 Harvard Civil Rights-Civil Liberties L. Rev. 80-85. Compare Fay v. Noia (1963) 372 U.S. 391, 399-426, with id. at 449-63 (Harlan, J., dissenting); compare Developments in The Law--Federal Habeas Corpus (1970) 83 Harv.L.Rev. 1038, 1042-62, 1263-74, and Reitz, Federal Habeas Corpus: Impact of an Abortive State Proceeding (1961) 74 Harv.L.Rev. 1315, 1324-1332, with Oaks, Legal History in the High Court--Habeas Corpus (1966) 64 Mich. L.Rev., pp. 451,451-458; and Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners (1963) 76 Harv. L.Rev. 441, 463-507. "The scope of federal habeas corpus for state prisoners has

(Footnote continued p. 5.)

In 1953, the Court held that, no matter how fully the state court had considered a federal constitutional issue, that issue could be redetermined by a federal court on habeas corpus. (Brown v. Allen (1953) 344 U.S. 443.) The Court reasoned that the state courts needed supervision to insure conformity in constitutional interpretation. In 1963, the relitigation rule of Brown, which gave a defendant a two-tier appeals system, was inevitably extended by the Court to a prisoner who had failed to litigate his claim in the state justice system. (Fay v. Noia, supra, 393 U.S. 391.) Specifically, the Court held that procedural default by a defendant in state courts will not preclude habeas corpus review unless the petitioner deliberately bypassed the state procedure. (Id. at pp. 426-427, 438.) On the same date, the Court decided Townsend v. Sain (1963) 372 U.S. 293, 312-313, 318, which held that the federal court was not bound by state determination of facts and laid down standards for determining whether a federal evidentiary hearing was necessary.

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evolved from a quite limited inquiry into whether the committing state court had jurisdiction, [Citations omitted.], to whether the applicant had been given an adequate opportunity in state court to raise his constitutional claims, [Citation omitted.]; and finally to actual redetermination in federal court of state court rulings on a wide variety of constitutional contentions . . . ." Schneckloth v. Bustamonte (1973) 412 U.S. 218, 255-56 (Powell, J., concurring).

Limitation of federal habeas corpus review has been proposed in various bills in Congress to curtail the scope of the writ.2/ The first clear indication that the Court might reconsider the role of federal habeas corpus was Schneckloth v. Bustamonte, supra,412 U.S. 218. The concurring opinion of Justice Powell prophesied his majority opinion in Stone v. Powell, supra, 428 U.S. 465. In the concurring opinion, four justices concluded that: 3/

> " . . . [F]ederal collateral review of a state prisoner's Fourth Amendment claims . . . should be confined solely to the question of whether the petitioner was provided a fair opportunity to raise and have adjudicated the question in state courts." (Id. at pp. 249-250.)

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2. See Paschal, The Constitution and Habeas Corpus (1970) Duke L.J. 605, 606; S.Rep.No. 1797, 89th Cong. 2d Session (1966); S917, 90th Cong., 2d Sess. § 702 (1968); 114 Cong.Rec.11, 189 (1968); H.R. 11, 441, 92d Cong., 1st Sess. (1971); S.567, 93 Cong.; 1st Sess. (1973); The Department of Justice urged habeas reform as part of speedy trial reform. See Hearing on S. 895 Before the Subcom. on Const. Rights of the Senate Judiciary Comm., 92nd Cong. 1st Sess. 93-121 (1971).

3. The concurring opinion actually included four justices, as Justice Blackmun's concurring opinion agreed with Justice's Powell's opinion, except for the necessity of reconsidering Kaufman v. United States (1969) 394 U.S. 217.

As a further response to its recognition of the Brown-Noia expansion costs, the Court questioned the primary elements of Fay v. Noia, supra, in three decisions in the 1975 term.

Estelle v. Williams (1976) 425 U.S. 501, 508-512 challenged the Fay principle of no automatic attribution of counsel's acts or omissions to the client. Francis v. Henderson (1976) 425 U.S. 536 modified the Fay criteria of the "deliberate bypass" standard by adding "cause" and "prejudice" requirements:

> "In a collateral attack upon a conviction that rule requires, contrary to the petitioner's assertion, not only a showing of "cause" for the defendant's failure to challenge the composition of the grand jury before trial, but also a showing of actual prejudice." (Id., at p. 542.)4/

Stone v. Powell, supra,428 U.S. 465, the most important of the trio, held that, at least as to Fourth Amendment claims, full and fair litigation of the issues in state courts would have a res judicata effect on federal habeas corpus. (Id., at pp. 481-482.)

The last indication of this Court's growing trust in the ability of

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4. There was a state time limitation for challenge of grand jury composition which the Court honored. (Id. at p. 537.)

state courts to properly apply federal constitutional principles is Wainwright v. Sykes (1977) 433 U.S. 72. In Sykes, the Court confirmed its modification of the "deliberate bypass" standard with a "cause" and "prejudice" standard as to all claims not timely raised. However, it was suggested in the dissent that Sykes extended the Stone v. Powell rule to the Fifth Amendment. (Id. at p. 87 fn. 11 and p. 110 (Brennan, J. dissenting).)5/

Distillation of Stone, Francis, and Sykes to their essence should result in a rule precluding federal habeas review of all constitutional questions except in cases where: (1) there was no full and fair state hearing; and (2) defendant had not waived his objection under state law, unless there was "cause" for the waiver and he had suffered "actual prejudice."

If either of these two factors are present federal habeas review should be available, regardless of the type of constitutional issue. As discussed infra, there is no rational justification for the Stone rule not being co-extensive with Sykes. All of the arguments advanced in Sykes, Stone, Francis and Scheckloth which favor careful exercise of discretionary habeas power, apply with equal force to all constitutional issues. Certainly, the federal courts, on habeas, should not

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5. The Court appropriately did not expressly extend the "full and fair litigation" concept to Fifth Amendment issues as Sykes was a case of waiver like Francis, rather than relitigation as in Stone.

attempt to exercise their power to review state convictions for sufficiency of the evidence, whether "due process" requires "any" or "some" evidence, or whether it requires "beyond a reasonable doubt" as petitioner urges herein (see Argument I. B. infra).6/

We advert first to the factors favoring extension of Stone to all constitutional issues.

The increasing burden of habeas filings on the federal judiciary merits consideration, especially in view of the increased availability of state forums, as detailed infra. Filings numbered 1,020 in 1961 and 9,063 in 1970. The rapid increase, approximately one thousand additional cases annually, in habeas corpus filings in the decade of 1960-1970 seriously clogged the federal courts. Petitions filed by state prisoners continue to represent a significant portion of the workload of the U.S. District Courts. In 1977, the 14,846 state prisoner petitions constituted 11.4% of all civil filings, whereas federal petitions amounted to only

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6. The disagreement between the District Court and the Circuit Court in the instant case as to whether there is "any evidence of premeditation is an indication that state courts are just as capable of deciding such issues.

3.6%.7/

"This Court has long recognized . . . considerations of comity . . ." (Francis v. Henderson, at p. 539; see Fay v. Noia, at pp. 425-426). Federal courts, in the exercise of this habeas corpus power, have traditionally considered "the minimization of friction between our federal and state systems of justice" and "the maintenance of constitutional balance upon which the doctrine of federalism is founded."8/ (Stone v. Powell, supra, 428 U.S., at p. 465, footnote 31, referring to Schneckloth v. Bustamonte, supra, 412 U.S. at p. 259 (Powell, J. concurring), and Kaufman v. United States (1969) 394 U.S., at p. 231.) Al-

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7. Annual Report of the Director of The Administrative Office of the United States Courts (1977) at pp. 188, 189,205; Id. (1971) at. p. II 45; 1971 Hearings on S. 895 Before Subcomm. on Constitutional Rights of the Senate Judiciary Committee, at pp. 97-98; 119 CONG. REC. S1305 (Jan. 26, 1973). See Brown v. Allen, supra, 344 U.S. 443, 532, 536 and n. 8, p. 536.

8. Current procedure allowing a federal district court judge to reopen and possibly overturn the trial decision of a state supreme or other highest court has been attacked over the years as causing needless tensions between the two court systems. Critics complain that it is needless because the state courts are equally bound to the Constitution and equally subject to the decisions of this Court. (Doub, The Case Against Modern Federal Habeas Corpus (1971) 57 A.B.A.J. 323, 327.)

though Justice Frankfurter rejected the notion that federal habeas procedure allows a "lower court" to sit in judgment on a "higher court" (Brown v. Allen, 334 U.S., at p. 510), certainly some state high court justices must disagree.

Another traditional factor in favor of limited exercise of federal habeas jurisdiction is "the necessity of finality in criminal trials." (Stone v. Powell, supra, 428 U.S., at p. 491 fn. 31; Wainwright v. Sykes (1977) 433 U.S. 72, 78.) The lack of finality causes various insoluble problems for state prosecutors and prison authorities: (1) it is difficult to relitigate facts many years after conviction because witnesses may be missing, unable to remember, or unwilling to testify; (2) relitigation of stale facts may produce a second trial where facts are no more reliable than the first (see Williams v. United States (1971) 401 U.S. 646, 691 (Harlan, J., dissenting); (3) "It is of course a commonplace of classical criminal-law theory that certainty and immediacy of punishment are more crucial elements of effective deterrence than its severity" (Bator, Finality In Criminal Law supra, 76 Harv.L.Rev. 441, at p. 452 fn. 21); and (4) the perpetual lack of finality impairs the speed and certainty of punishment essential for effective rehabilitation. (See e.g. 1971 Hearings, supra at note 2; Bator, supra, at

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p. 452;9/

In Wainwright v. Sykes, this Court realistically acknowledged the possibility of "sandbagging":

> "We think that the rule of Fay v. Noia, broadly stated, may encompass 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." (433 U.S. at p. 89.)

That same type of gamesmanship can be played by any state prisoner seeking federal habeas review. Since there is no time limitation on his petition, he can seek federal redress at any time that may be advantageous to him, such as when a crucial witness dies or absents himself or upon loss of important evidence. Obviously, persons on direct review have much less control of the

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9. Professor Bator opines: "The first step in achieving that aim [rehabilitation of offenders] may be a realization by the convict that he is justly subject to sanction, that he stands in . . . need of rehabilitation, and a process of re-education cannot, perhaps, even begin if we make sure the cardinal moral predicate is missing, if society itself tells the convict that he may not be justly subject to reeducation and treatment in the first place." (Supra, 76 Har.L.Rev., at p. 452.)

timing of the processing of their claims.

The cumulative effect of lack of finality, coupled with all the afore-described costs, has now finally tipped the scales in favor of yielding the primary remedy for constitutional error to state process. Balancing the extravagant costs of federal habeas corpus against the protection of individual constitutional rights, Stone should be applied to all constitutional claims, just as Francis-Sykes is, because the state court systems are now capable and willing to protect fundamental rights.

Historically, the expanding availability of the habeas corpus writ was in part due to the state courts' inability to enforce constitutional rights. Professor Bator indicates that the "principal problem" in limiting the scope of federal habeas review in 1963 was the "inadequacy of state procedures for the vindication of federal constitutional procedures." (Bator, supra, 76 Har.L.Rev. 441, at p. 522.) In Brown v. Allen, Justice Frankfurter acknowledged that the primary responsibility for enforcing the Constitution must be with the states, but he supported broad federal habeas jurisdiction only because of the possible insensitivity of some state judges toward the Constitution. (344 U.S., at pp. 510, 511.) While in 1953 and 1963, such a fear was well-founded, today such

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trepidation would be baseless and this "Court's willingness to overturn or modify its earlier views of the scope of the writ" (Wainwright v. Sykes, supra, at p. 81) may now be employed without fear of loss or diminution of the individuals' federal rights.10/

This Court has itself recognized in Stone that state court protection has come of age:

> "The policy arguments that respondents marshal in support of the view that federal habeas corpus review is necessary to effectuate the Fourth Amendment stem from a basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights. The argument is that state courts cannot be trusted to effectuate Fourth Amendment values through fair application of the rule, and the oversight jurisdiction of this Court on certiorari is an inadequate safeguard. The principal rationale for this view

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10. Mr. Justice Brennan's prediction that broad federal habeas jurisdiction would stimulate the states to devise adequate post-conviction procedures has been fulfilled. (See Brennan, Federal Habeas Corpus and State Prisoners: An Exercise in Federalism (1961) 7 Utah L.Rev. 423, 440-441.)

> emphasizes the broad differences in the respective institutional settings within which federal judges and state judges operate. Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law. Martin v. Hunter's Lessee, 1 Wheat. 304, 341-344 (1816). Moreover, the argument that federal judges are more expert in applying federal constitutional law is especially unpersuasive in the context of search-and-seizure claims, since they are dealt with on a daily basis by trial level judges in both systems. In sum, there is 'no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the [consideration of Fourth Amendment claims] than his neighbor in the state courthouse.' (Bator, supra, n. 7, at 509.)" (428 U.S. at pp. 493-494, fn. 35.)

This expression of trust in state processes in Stone is well based in view of the time state courts have had to digest and apply this Court's decisions of the last two decades, the increasing number of state courts enforcing fundamental rights based on "independent state grounds," and the beginning of a decline in the number of prisoners finding need to resort to federal forums.11/

Perhaps the greatest evidence of the fact that state courts are concerned with fundamental rights, and therefore must be capable and willing to follow the Court's mandate of the last two decades, is their own willingness to exceed those mandates by even more zealous protection. Mr. Justice Brennan recently recognized this phenomena by noting that " . . . numerous state courts

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11. The ability of state courts to develop their bills of rights independently of the Federal Constitution derives directly from the fundamental nature of our dual judicial system. Under article III the jurisdiction of the federal courts is restricted to nine classes of cases. While the federal courts are empowered to review issues arising under federal law, the Constitution grants no authority for the Supreme Court or the lower federal courts to review a state court interpretation of state law. (Eric R.R. v. Tompkins (1938) 304 U.S. 64, 78.) Neither may Congress expand the Court's review authority as set out in article III. (Marbury v. Madison (1803) 5 U.S. (1 Cranch.))

. . . have already extended to their citizens via state constitutions, greater protections than the Supreme Court has held are applicable to the Federal Bill of Rights." (Brennan, State Constitutions and The Protection of Individual Rights (1977) 90 Harv. L. Rev. 489.) Justice Brennan opines " . . . these state courts discern, and disagree with, a trend in recent opinions of the United States Court to pull back from, or at least suspend the Boyd principle with respect to application of the federal Bill of Rights and the restraints of the due process and equal protection principles of the Fourteenth Amendment." (Id., at p. 495.)12/

If the states find it necessary to employ their own bills of rights to expand rights and liberties, a fortiori they must, at a minimum, be willing and competent to conform to federal constitutional requirements imposed by this Court during the last two decades.

The extent of the use of "an adequate and independent state ground" has spread during the last decade. We are aware of at least 19 different state appellate courts which have interpreted their own

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12. The "Boyd principle" refers to Boyd v. United States (1886) 116 U.S. 616, 635: " . . . constitutional provisions for the security of person and property should be liberally construed . . . . It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

constitutions in ways more protective of basic rights than extant or anticipated Supreme Court decisions. 13/ Also, many

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13. Those states are: California (numerous decisions); New Jersey (State v. Johnson (1975) 346 A.2d 66, 68; NAACP v. Mt. Laurel (1975) 336 A.2d 713, appeal dismissed and cert. den., (1975) 423 U.S. 808); Hawaii (State v. Kaluna (1974) 520 P.2d 51); Michigan (People v. Jackson (1974) 217 N.W. 2d 22); South Dakota (Parham v. Municipal Court (1972) 199 N.W.2d 501); Maine (State v. Sklar (1974) 317 A.2d 160); Alaska (Roberts v. State (1969) 458 P.2d 340 and Etheridge v. Bradley (1972) 502 P.2d 146); Delaware (State v. Wolf (1960) 164 A.2d 865); Flordia (State v. Barquet (1972) 262 So.2d 431); Georgia (Nat. Mtge. Corp. v. Suttles (1942) 22 S.E.2d 386 and Carey v. City of Atlanta (1915) 84 S.E. 456); Idaho (Murphy v. Pocatello School District (1971) 480 P.2d 878); Indiana (Speight v. State (1959) 155 N.E.2d 752); Kentucky (Bradshaw v. Ball (1972) 487 S.W. 2d 294 Mass. (Nason v. Superintendent etc. (1968) 233 N.E.2d 908); Mississippi (Tucker v. State (1922) 90 So. 845); New York (People v. Donovan (1963) 243 N.Y.S.2d 841); Oklahoma (Hunter v. State (1955) 288 P.2d 425); Oregon (Portland v. Welch (1961) 364 P.2d 1009; State v. Brown (1972) 497 P.2d 1191, 1196); Rhode Island (State v. Le Blanc (1966) 217 A.2d 471); Texas (Trammel v. State (1956) 287 S.W.2d 487); Utah (State v. Eichler (1971) 483 P.2d 887); and Wisconsin (Gall v. Wittig (1969) 167 N.W. 2d 577). Many of these states have several other decisions based wholly or partially on state constitutional grounds.

state courts, as in their prerogative (Oregon v. Hass (1975) 420 U.S. 714, 719), have imposed, without resorting to their own constitution, greater restrictions on police activity than those the Supreme Court has held to be necessary under federal constitutional standards. 14/

Finally, filing of federal habeas petitions by state prisoners increased by at least one thousand per year from 1962 to 1970, dropped slightly in 1971 and thereafter increased from 1971 to 1976 at a much slower rate, and then dropped again in 1977. (1977 Annual Report, supra, at pp. 188-189, 205.) 15/ The Administrative Office of the United States Courts opined in 1971 that " . . . it is quite likely that the availability of more legal services to state prisoners and the improvements being made in judicial and post-conviction procedure in many states have begun to open other legal routes which prisoners must exhaust before approaching Federal Court." (1971 Annual Report, supra, at p. II-50.) That conclusion is even more unquestionably correct given the state courts' usage of "independent state grounds" and their concomitant capability and willing-

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14. e.g. Wyoming (Croker v. State (1970) 477 P.2d 122); Colorado (Velarde v. People (1970) 466 P.2d 122); Colorado (Velarde v. People (1970) 466 P.2d 919); New York (People v. Kelly (1974) 353 N.Y.S. 111, 117).

15. The 1977 Report at p. 205 notes that state prisoner petitions decreased more than 12% during the present 12-month period.

ness to apply federal constitutional principles.

In addition to the consideration detailed supra, there are other factors that are particularly relevant to the scope of federal habeas jurisdiction with respect to sufficiency of the evidence.

Obviously, if evidentiary sufficiency on habeas review is further constitutionalized, habeas jurisdiction will necessarily be expanded, contrary to the trend of cautious limitation so apparent and so fully justified in Stone, Francis, and Sykes. Justice Stewart recognized that problem in his proposal in Freeman v. Zahradnick (1977) 429 U.S. 1111, 1115: "The approach I suggest would expand the contours of one kind of claim cognizable on federal habeas corpus."

Secondly, constitutionalizing sufficiency of the evidence is in direct contradiction of the limited role of a federal judge when a jury is the trier-of-fact. "Even the trial court, which has heard the testimony of witnesses first hand, is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal." (Burks v. United States (1977) 437 U.S. 1, 16.) How much more futile it would be for federal judges to pore over state transcripts to determine if the prosecution case was proved beyond a reasonable doubt. Such a retrial-by-transcript would be wasteful exercise:

> "A stenographic transcript correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the words signify. The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried." (Broadcast Music v. Havana Madrid Restaurant Corp. (2nd Cir. 1949) 175 F.2d 77, 80.)

Justices Marshall, Brennan and Powell in their dissent in Swisher v. Brady (1978) ____ U.S. ____, made a perfect case against expanding federal habeas review of sufficiency of the evidence:

> "In a criminal proceeding, where the issue posed is the threshold one of whether a defendant has been proven guilty of a crime beyond a reasonable doubt, the same considerations surely have at least as much force. Indeed, the need for achieving the most reliable determinations of evidentiary facts, and particularly of credibility, exists a fortiori where the factual determinations must be made beyond a reasonable doubt.
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> "As the Maryland courts have have held, In re Brown, 13 Md. App. 625, 632-633, 284 A.2d 441,

444-445 (1971), and as is self-evident from the structure of Rule 911, the master's function at the hearing is, in large part, to assess the credibility of the witnesses. That function simply cannot be replicated by the 'judge,' acting in his essentially appellate capacity reviewing the record;

"* * *

"But more importantly, when a juvenile seeks to reopen the proceeding before the judge--in order to avoid having a case decided against him on the basis of a cold record in violation of the Due Process Clause--he is being subjected to a second trial of the sort clearly prohibited by the Double Jeopardy Clause." (___ U.S. ___ [98 S.Ct. 2699 at pp. 2714, 2715].) 16/

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16. Of course, if an evidentiary hearing were held in every case, retrying the entire case, assuming the witnesses were available with their full recall, the federal judge would be in a position to assess the evidence. However, such an evidentiary hearing would, at a minimum, violate the spirit of Double Jeopardy. (Burks v. United States, supra, 437 U.S. 1; Green v. Massey (1978) 437 U.S. 19.)

The majority in Sykes also recognized the value of determinations by "the judge who observed the demeanor of the witnesses . . ." (433 U.S., at p. 88).

Assuming the dissent in Swisher is correct in its assessment of the difficulty in judging "reasonable doubt" from a "cold record", another factor against expanding habeas corpus by changing the sufficiency standard is the potential of erroneous decisions without a remedy for the prosecution. Under Burks v. United States, supra, 437 U.S. 1 and Green v. Massey, supra, 437 U.S. 19, if the federal court retries the state case by transcript and determines the evidence was insufficient, then double jeopardy prevents a retrial. 17/ This harsh result cannot be justified considering the substantial likelihood of judicial error in trial-by-transcript.

In conclusion, it seems highly incongruous that under Sykes, the Court has apparently extended federal habeas limitation to all types of claims when a defendant failed to obtain a hearing of the constitutional issue in the state courts, but in cases where issues have been given a "full and fair hearing" only Fourth Amendment claims are precluded from redundant federal habeas litigation. In other words, discretionary habeas power should be even more properly restrained where a state prisoner has had one (state) hearing, than where he has had none. This Court's hostility to duplication and relitigation as expressed in Francis and Sykes, which

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17. As discussed infra, from a cold record it is undoubtedly easier to judge "some evidence" than "beyond a reasonable doubt."

require defendants to raise their constitutional claims in state trial courts, is even more well founded in cases such as this one where the defendant has already litigated his claim in the state court system.18/ For the preclusive con-

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18. Amicus will not attempt to fully brief whether petitioner failed to raise his "constitutional" issue in the state court system or whether he enjoyed a "full and fair hearing." Thorough exploration of that subject is better left to the respondent. However, according to Roundtree v. Riddle (D.C. W.D.Va. 1976) 417 F.Supp.1274, petitioner had the benefit of a "full and fair hearing." The identical state procedure was followed in Roundtree (see p. 1275). Petitioner Jackson appealed his conviction in the Virginia Supreme Court which was fully considered by the Court (according to their recitation) and they found no error (Appendices A & B). Of course, there was no formal oral argument or written opinion. However, it can be argued that petitioner failed to properly raise his "constitutional" issue by waiving his right to orally argue for the granting of his petition. Petitioner's conclusion in his Petition for Writ of Error stated:

> "The attorney for Petitioner adopts this as his opening brief in the event a Writ of Error is awarded, and does not demand to state orally the reasons for granting the petition." (Appendix A.)

Under the pertinent rules (Rule 5.28 of

(Footnote continued p. 25.)

sequences of failure to raise a claim in state proceedings to apply to the entire spectrum of constitutional issues, but the preclusive consequences of fully litigating a claim in state courts to apply only to Fourth Amendment issues, is, at best, inconsistent.

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the Rules of the Virginia Supreme Court), petitioner had a right to appear before one Virginia Supreme Court Justice, which he waived.

It is at least arguable that petitioner falls within Sykes for one other reason. In his brief to the Virginia Supreme Court he complained that Virginia violated Mullaney v. Wilbur (1975) 421 U.S. 684, by requiring him to prove he was too drunk to deliberate and premediate (Appendix A). He did not specifically contend, as he does now, that the state failed to prove premeditation beyond a reasonable doubt. Apparently, the first time he pressed his specific point was in his petition for collateral review in the United States District Court for the Eastern District of Virginia (Petition for Cert. p. 6). Since the Supreme Court of Virginia has never been presented with the constitutional issue herein raised, it would appear that the District Court should have refrained from collateral review a la Wainwright v. Sykes.

In any event, if petitioner's brief to the Virginia Supreme Court presented the issue raised herein petitioner had a "full and fair hearing" (Roundtree v. Riddle, supra, 417 F.Supp. 1274); or, if

(Footnote continued p. 26.)

Both Chief Justice Burger and Justice Powell have indicated their belief that Stone should be extended to other claims. In Brewer v. Williams (1977) 430 U.S. 387, 415-430, the Chief Justice, in dissent, opined that Stone should have barred relitigation of the Massiah-type counsel claim in that case. In Castaneda v. Partida (1977) 430 U.S. 482, Justice Powell, in dissent, opined that Stone should be extended to discriminatory grand jury claims.

It is submitted that a piecemeal approach to the application of Stone is not warranted. A general application could provide more assurance of individual rights than Sykes did because the "full and fair hearing" requirement of Stone insures at least one full litigation of a defendant's claim.

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the brief missed the mark in presenting the instant issue, petitioner should have been precluded from collateral review absent a showing of "cause" and "actual prejudice."

B. The Standard of "Some" or "Any" Evidence on Federal Habeas Review Satisfies Due Process; Application of the Reasonable Doubt Standard Would Constitute Retrial-By-Transcript

Petitioner seeks to use Justice Stewart's single justice dissent in Freeman v. Zahradnick, supra, 429 U.S. 1111, 1112, which suggests the expansion of In re Winship (1970) 397 U.S. 358, to bootstrap himself into an argument that the Due Process Clause requires federal courts on habeas corpus to review cold state records to determine whether any "rational trier of fact could find guilt beyond a reasonable doubt." Petitioner makes this contention notwithstanding the equivocation in the lone dissent; the lack of a fundamental claim; the concomitant expansion of habeas jurisdiction; the fact that such review would constitute trial-by-transcript, and the fact that Patterson v. New York (1977) 432 U.S. 197 and other intervening cases make it abundantly clear that In re Winship was never meant to overrule or in any way modify Thompson v. Louisville (1960) 362 U.S. 199.

Petitioner's contentions are patently fallacious unless due process is to be extended in this area of sufficiency of the evidence, far beyond its bounds elsewhere.

While the term "due process of law" has been "the center of substantial legal debate over the years " (see In re

Winship, supra, 397 U.S. 358, 378 (J. Black dissenting)), broadly interpreted, "due process of law" means fundamental fairness within our system of laws. (See e.g. In re Winship, supra, at 381; Rochin v. California (1952) 342 U.S. 165, 169). Due process of law protects an individual from arbitrary action of the government and action which shocks the conscience by failing to comport with traditional ideas of fair play and decency. (See e.g. Meachum v. Fano (1976) 427 U.S. 215, 226; Breithaupt v. Abram (1957) 352 U.S. 432, 435. "Traditionally, due process has required that only the most basic procedural safeguards be observed . . ." (Patterson v. New York, supra, at p. 210). The question then is whether the traditional "some" or "any" evidence standard on federal habeas review "offends some principle of justice so deeply rooted in traditions and conscience of our people as to be ranked as fundamental." (Id., at p. 202.)

To render a criminal conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment, the conviction must be "totally devoid of evidentiary support." (Garner v. Louisiana (1961) 368 U.S. 157, 163.) As noted by Chief Justice Warren, this Court's due process of law inquiry does not turn on a question of the sufficiency of evidence to support the conviction, but on whether the conviction rests upon "any" evidence

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which would support the finding of guilt.19/ (Id., at 163-164; see also Shuttlesworth v. Birmingham (1965) 382 U.S. 87, 94-95; Thompson v. Louisville, supra, 362 U.S. 199, 204, 206.) Since federal habeas review only involves the requisite aforedescribed due process standard, the probative strength of evidence has never been permitted to be an issue in habeas corpus. (Young v. Boles (4th Cir. 1965) 343 F.2d 136, 138.)

Petitioner's reliance on Justice Stewart's dissenting remarks in the denial of certiorari in Freeman v. Zahradnick, supra, 429 U.S. 1111, is ill-founded. Justice Stewart was apparently only throwing out an idea; he had not decided that the reasonable doubt standard should be introduced into federal habeas jurisdiction:

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19. Chief Justice Warren stated:

> " . . . we hold that the convictions in these cases are so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the Fourteenth Amendment. As in Thompson v. City of Louisville, 362 U.S. 199, our inquiry does not turn on a question of sufficiency of evidence to support a conviction, but on whether these convictions rest upon any evidence which would support a finding that the petitioners' acts caused a disturbance of the peace." (Id., at pp. 163-164.)

> "What I am suggesting is simply that the question whether there was sufficient evidence to support a finding by a rational trier of fact of guilt beyond a reasonable doubt may be of constitutional dimension." (Emphasis added, at p. 1115.)

The history of due process as it relates to sufficiency of the evidence and the reasonable doubt standard establishes that the Court has never intended to impose the reasonable doubt formulation on federal habeas review. It is unworkable and not a part of due process; it is only required at the trial level.

Thompson v. Louisville was the first criminal case where lack of evidentiary support was elevated to constitutional proportions.[20] It seems probable that the Court embarked on constitutionalizing the quantitative aspect of evidence

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20. However, a similar analysis by Mr. Justice Black presaged Thompson in Konigsberg v. State Bar (1957) 353 U.S. 252. The Court held that it was a denial of due process for the bar to refuse to certify an applicant for bar admission because he had failed to prove that he was of good moral character. In Konigsberg, as in Thompson, the Court made an independent examination of the sufficiency of the evidence to determine if the adjudicating body was justified in reaching the result it did.

and departing from its historical reluctance to intervene in state fact-finding because of the peculiar facts in Thompson which included no state review, suspected persecution and harassment of petitioner, the fact that petitioner was black, and the uncontested nature of the evidence. (See 80 ALR2d. 1355, 1376.) Review of the quantitative value of evidence requires the Court to determine whether the fact-finder could reasonably infer the ultimate fact of guilt from the sum of the evidence presented by the state. (See Schware v. Board of Bar Examiners (1957) 353 U.S. 232). The "no", "any", or "some" evidence due process standard was confirmed in Garner v. Louisiana, supra, 368 U.S. 157, 163, and Shuttlesworth v. Birmingham, supra, 382 U.S. 87, 94-95.

This standard has not changed since those cases, although petitioner attempts to assert that Winship constitutionalized the reasonable doubt standard for collateral review. Winship merely applied the traditional reasonable doubt standard at the trial level to juvenile proceedings: the standard is "required during the adjudicatory stage of a delinquency proceedings." (Id. at p. 368.) The Court had never before held that the reasonable doubt standard was constitutionally required, even in adult criminal proceedings. (Id., at p. 385 (Black J., dissenting.) The Court did not state or even imply that appellate or collateral review required a finding that the trier-of-fact properly concluded that the standard had been met.

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Four years subsequent to Winship, the Court was presented with an opportunity to apply the Winship rule to federal collateral review in Vachon v. New Hampshire (1974) 414 U.S. 478. Instead, the court, citing Harris v. United States (1971) 404 U.S. 1232, 1233 (Douglas, J., in chambers), Thompson v. Louisville and other cases stated: "It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged . . . violates[s] due process." (Vachon, at p. 480.) Chief Justice Burger and Justice White, in their dissent, confirmed how limited due process is when applied to sufficiency of the evidence:

> "Even if appellant's sufficiency-of-the-evidence contention in the Supreme Court of New Hampshire could be said to have been presented as a federal constitutional claim based on Thompson v. Louisville [citation], I would nonetheless be unable to join in the Court's disposition of it. In Thompson, the only state court proceedings reaching the merits of the case were in the Louisville Police Court from which there was no right of appeal to any higher state court, and there was therefore no state court opinion written which construed the statute under which Thompson was convicted. This Court therefore had no choice but to engage in its own construction of the

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> statute and upon doing so it concluded that the record was 'entirely lacking in evidence to support any of the charges.' Id., at 204, 4 L.Ed. 2d 654. Thompson was obviously an extraordinary case, and up until now has been saved for extraordinary situations; it has not heretofore been broadened so as to make lack of evidentiary support for only one of several elements of an offense a constitutional infirmity in a state conviction." (At p. 671; emphasis added.)

The statement in the emphasized quote refers to the fact that Justice Douglas in his single justice opinion in Harris v. United States, first grafted on the every element criteria to the Thompson test.21/ The majority in Vachon surprisingly adopted it without explanatory comment. Therefore, it is questionable that the "elements" requirement applies to the Thompson test.

Apart from Vachon, the decisions between Winship and Patterson v. New York, supra, indicate that the reasonable doubt standard is not appropriate or required by

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21. Of course, the Winship case did include similar language with respect to the reasonable doubt standard at the trial level: " . . . of every fact necessary to constitute the crime with which he is charged." (Id. at p. 264, 364.)

due process in appellate or collateral review.

The vitality of Winship at the trial stage was confirmed in Mullaney v. Wilbur (1975) 421 U.S. 684, where the court employed Winship to invalidate Maine's affirmative defense of provocation. The rationale was that to require the defendant to prove provocation by a preponderance of the evidence violated Winship's requirement that the state prove beyond a reasonable doubt "every fact necessary to constitute the crime." Manslaughter was distinguished from murder by the absence of provocation. Therefore, the Court held that at trial, Maine had to prove the absence of provocation beyond a reasonable doubt when the issue was raised by the defense.

Just two years later, however, in Patterson v. New York, supra, 432 U.S. 197, it became clear that Mullaney did not portend further extension of Winship such as to appellate or collateral review. Professor Allen has summed up his opinion why Mullaney should only be considered to be a temporary forage into extending the reasonable doubt standard by use of due process:

> "In his dissent in Patterson, Justice Powell accused the Court of 'drain[ing] In re Winship . . . of much of its vitality.' Justice Powell was wrong. Patterson did not 'drain Winship of its vitality'; rather, it rejected Mullaney's extension of Winship beyond the latter's legitimate

> boundaries, and thus it restored Winship to its original purpose. Careful examination of these three cases shows not only that Patterson rightly rejected the due process analysis employed in Mullaney, but also indicates the proper scope of the federal interest in the reasonable doubt standard.
>
> " * * *
>
> "The important point to note about the Winship Court's treatment of burdens of proof in criminal cases is that the Court's due process analysis relied heavily on the common practice in the states and only supported the implications of that practice by reference to the interests protected. The Court attempted no thorough examination of those interests and did not purport to consider fully the states' burden-of-persuasion practices. Indeed, affirmative defenses were never even mentioned by the Court. In Mullaney, by contrast, the Court reversed its order of reasoning, concentrating first on the interests protected by the reasonable doubt standard rather than on whether Maine's statute 'offends some principle of justice so deeply rooted in the traditions and conscience of our people as to be ranked as fundamental.' This reversal of the analysis in Mullaney was the cause of Patterson's subsequent disavowal of Mullaney, for

it had implications far beyond what Winship could support.

" * * *

"One can now see more clearly the shift of analysis in Mullaney that permitted it to accomplish a result that Winship could not sustain. Mullaney invoked Winship not to invalidate a burden-of-proof practice demonstrably inconsistent with the 'traditions and conscience of our people,' but instead used that case in a fashion that would provide the means to invalidate a practice long accepted throughout the country. Thus Mullaney, which purported to 'apply' Winship, drastically altered that case from one that looks to traditional practice and prevailing usage by the states to aid in due process analysis to one that frees the federal courts to impose their own view about the appropriate use of the reasonable doubt standard on the states notwithstanding widely shared views to the contrary.

" * * *

"Thus, one significant aspect of Patterson is, in short, the restoration of Winship to its original purpose and the concomitant refusal to permit Winship to be misconstrued and then employed as the basis for unjustifiable extensions of federal authority."

(Allen, The Restoration of In re Winship: A Comment on Burdens of Persuasion In Criminal Cases After Patterson v. New York (1977) 76 Mich. L. Rev. 30.)

The recognition in Patterson and Sykes that "common practice" supports findings of constitutionality is nothing more than a reaffirmation that due process is a very limited and basic concept:

> "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, Irvine v. California, 347 U.S. 128, 134 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (Patterson, at pp. 201-202.)

The Patterson opinion is careful to specifically limit the parameters of the Due Process Clause as it was employed in Mullaney:

"There is some language in Mullaney that has been understood as perhaps construing the Due Process Clause to require the prosecution to prove beyond a reasonable doubt any fact affecting 'the degree of criminal culpability.' . . . The Court did not intend Mullaney to have such far-reaching effect." (Footnote 15, at pp. 214-215.)

Petitioner attempts to argue that since federal judges must apply the reasonable doubt standard on motions for acquittal they are fully equipped to do so on collateral review of state convictions (Petition for Certiorari p. 17). Petitioner cites United States v. Taylor (1972) 464 F.2d 240, the case where the circuits achieved uniformity in the standard they apply. Chief Judge Friendly, quoting from another case, stated the uniform rule:

"The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if

there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter." (Id., at p. 243.)

The crucial point which petitioner omits, or fails to comprehend, is that Winship may require such criteria on motion for acquittal because the proceedings are during trial. (Taylor, at p. 242.) Even if Winship does not compel the judge to apply the reasonable doubt standard, it can be easily applied by the trial judge because he is not working with a cold record, but has presumably heard the testimony first hand.22/

The dissenters in Swisher v. Brady, supra, ____ U.S. ____ (98 S.Ct. 2699), thoroughly explored the difficulties of judges applying the reasonable

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22. This Court recently reiterated the rule that "[e]ven the trial court, which has heard the testimony of the witnesses first hand, is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal [citations omitted]." (Burks v. United States, supra, at p. 16.) Realistically, a trial judge cannot help but consider credibility and weight.

doubt standard to cold records made by juvenile hearing masters (see Argument I.A). Certainly, the reliability of determinations of evidentiary facts is more in question where a federal judge is reviewing a state record, sometimes decades old. It may be almost impossible for the judge to determine with any certainty on such a record whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. In comparison, it was much easier in Swisher for a judge to review a master's fresh record.

Finally, as discussed supra, the burden on the federal court system would be overwhelming. The issue of sufficiency of the evidence necessarily involves a reading and understanding of the entire record. The higher standard proposed would require even more careful consideration of the record and almost all state appeals involving the sufficiency of the evidence would be presented to federal courts. This second sufficiency review would certainly double the current federal habeas workload, if not in filings, certainly in man hours.

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CONCLUSION

For the foregoing reasons amicus curiae State of California joins respondent Commonwealth of Virginia in urging that the judgment of the United States Court of Appeals for the Fourth Circuit be affirmed.

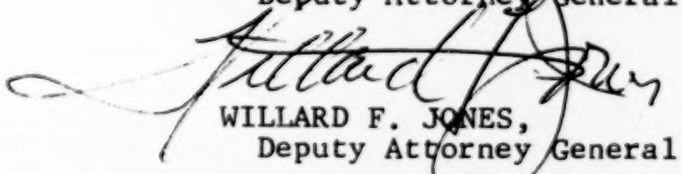
Respectfully submitted,

GEORGE DEUKMEJIAN, Attorney General

JACK R. WINKLER, Chief Assistant
Attorney General-Criminal Division

ARNOLD O. OVEROYE,
Assistant Attorney General

EDDIE T. KELLER,
Deputy Attorney General



WILLARD F. JONES,
Deputy Attorney General

JANE K. FISCHER,
Deputy Attorney General

WFJ:mls/mt
79US0004
2-13-79

APPENDIX A

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

No. _____

COMMONWEALTH OF VIRGINIA, Appellee,

v.

JAMES A. JACKSON, Appellant.

PETITION FOR WRIT OF ERROR
TO THE
CIRCUIT COURT OF
CHESTERFIELD COUNTY,
VIRGINIA

MACK T. DANIELS, ESQUIRE
4401 Old Hundred Road
P. O. Box 580
Chester, Virginia 23831

IN THE SUPREME COURT OF VIRGINIA

JAMES A. JACKSON, Plaintiff in Error,

v.

COMMONWEALTH OF VIRGINIA, Defendant in Error.

PETITION FOR WRIT OF ERROR

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF VIRGINIA:

Your Petitioner, James A. Jackson, represents that he is aggrieved by a final judgment of the Circuit Court of the County of Chesterfield, Virginia, entered August 21, 1975, as a result of a trial without the intervention of a jury, whereupon the Petitioner was convicted of murder in the first degree and had imposed upon him a sentence of thirty (30) years in the Virginia State Penitentiary.

MATERIAL PROCEEDINGS IN THE LOWER COURT

On March 27, 1975, Petitioner was tried on a plea of not guilty, without intervention of a jury, before the Honorable Ernest P. Gates. Judge of the Circuit Court of Chesterfield County, Virginia, upon an indictment charging him with the murder of Mary Huston Cole. The evidence consisted of testimony from various witnesses on behalf of the Commonwealth as to the relationship between Petitioner and the deceased and their respective physical conditions on the evening deceased was last

seen alive. Also, evidence on behalf of the Commonwealth in the form of medical examiner's reports, ballistic expert testimony, photographs, and a .38 caliber pistol identified as belonging to Petitioner, with which he had been seen prior to the death of the decedent. After the evidence was in, the Court found Petitioner guilty of first degree murder and ordered a pre-sentence report which was introduced on August 21, 1975, whereupon Petitioner was sentenced to thirty (30) years in the Virginia State Penitentiary. Then Petitioner, by counsel, moved the Court to set aside the judgment on the grounds that the judgment was contrary to the law and the evidence.

ASSIGNMENTS OF ERROR

That the trial court erred in finding and refusing to set aside its judgment as contrary to the law and the evidence in that unwarranted inferences were drawn by the Court from the Commonwealth's evidence, and that the Court erred in failing and refusing to grant a new trial, the motion for which was made on the ground that the Petitioner's conviction was contrary to the law and the evidence.

QUESTIONS INVOLVED

Whether the trial Court erred in finding the Petitioner guilty of first degree murder in light of the evidence introduced on behalf of the Commonwealth, and on unwarranted inferences drawn from this evidence.

/

STATEMENT OF FACTS

On August 26, 1974, a warrant was issued in Chesterfield County, Virginia, charging James A. Jackson with the murder of Mary Huston Cole on August 24, 1974. Your Petitioner, James A. Jackson, was subsequently arrested in Fayetteville, North Carolina, waived extradition and was brought back to Chesterfield County, Virginia. On March 27, 1975, trial was held, without intervention of a jury, before the Honorable Ernest P. Gates, Judge of the Circuit Court of Chesterfield County, Virginia, upon the Petitioner's plea of not guilty.

Witness of the Commonwealth, Sally Cole, testified that Petitioner and her husband had several bottles and went to the store and came back with two six-packs (TR 33-37).

Curtis Cole, witness for the Commonwealth, testified that Petitioner had been drinking and was pretty well loaded (TR 55-57).

David A. Andres, Deputy Sheriff, Chesterfield County, testified that he and two police officers, in uniform, had seen deceased and Petitioner shortly before decedent's death; that both were drinking and Petitioner was in pretty rough shape (TR 65-66). That Petitioner had the pistol identified as Commonwealth's Exhibit 1. That Andrews gave the pistol back and observed butcher knife in decedent's car (TR 68). That Andrews wanted to get them outside the diner because they had been drinking and she was

a fellow employee (TR 69). Andrews was asked if they were loaded and he replied that Petitioner was. Andrews stated he then asked Petitioner to let him keep the gun but was told they were going home, so Andrews told deceased to drive because Petitioner was too drunk (RT 72). Andrews also testified that the couple indicated to him that they were going to engage in sexual activity and laughed about it (TR 73).

Mark E. Wilson, detective for Chesterfield County Police Department, testified that he later found, at the scene where deceased was found, six shell casings later identified as having come from Petitioner's pistol. Also introduced through this witness was a statement by Petitioner as to what had happened after leaving Deputy Sheriff Andrews, a color photograph of deceased, numbered Commonwealth's Exhibit 9 but designated Number 8 in transcript, the autopsy report, Commonwealth's Exhibit 13 showing probable cause of death, no trauma, skull normal and no fractures, along with an unnumbered exhibit of laboratory report showing deceased's blood alcohol content of 0.17 by weight by volume.

Petitioner's statement, testified to by Wilson, stated that he and deceased rode to the churchyard (where she was found) and that she wanted to have sex with him, that he didn't want to, that an argument ensured, that she tried to stab him with the knife that Andrews had seen, and that he shot five or six times into the ground, and that he reloaded and when she tried to take the gun from him, "that's when it happened" (TR 90). Petitioner's

statement to Wilson was also that he and deceased had consumed "a fifth of Old Crow, a fifth of Wild Turkey and a pint of ___", and they bought two six-packs of beer (TR 92).

At the conclusion of the evidence the Commonwealth's Attorney argued that it was a case of second degree murder (TR 111-112).

However, the Court observed the color picture, Commonwealth's Exhibit 9, and refered to the mutilation, which was never referred to in the autopsy report (TR 115, line 16). Again (TR 115, line 21) the Court said it was a very horrible looking picture. Again at line 25 the Court said, "look at the face".

The Court indicated (TR 116, line 12) that if the Petitioner were drunk he would have been arrested.

Whereupon Petitioner was found guilty of first degree murder and a pre-sentence report was ordered.

On August 21, 1975, a pre-sentence report was introduced and the Commonwealth's Attorney based his argument for punishment on a previous jury verdict of thirty years in the State Penitentiary in a different and dissimilar case (TR 121); whereupon the Judge followed this argument and sentenced Petitioner to thirty (30) years in the Virginia State Penitentiary (TR 125). Whereupon, counsel for Petitioner moved to set aside the judgment as being contrary to the law and evidence, which motion was denied and excepted to.

ARGUMENT

Petitioner contends that statements made by the trial judge show that the evidence on behalf of the Commonwealth was either excluded from consideration (i.e., evidence of Petitioner's drunken condition), or that unfounded inferences were drawn by the trial judge from other Commonwealth's evidence (i.e., Commonwealth's Exhibit 9).

While it is conceded that the Commonwealth's evidence does not fix the time of decedent's death, the use of the statement made by Petitioner as to events leading up to shooting led one to infer that it happened shortly after Petitioner and deceased left the company of Deputy Sheriff Andrews on August 24, 1974. Since it is the only credible, uncontradicted evidence as to when the shooting took place, Petitioner contends that the Court was bound by it. There was no indication by the Court that its decision was based on the possibility that by the time of the shooting, Petitioner had become sober; the contrary indication was given by the Court that if Petitioner were drunk he would have been arrested by Andrews (TR 116, line 12). This inference is in direct conflict with Andrews' testimony that Petitioner was "loaded" (TR 72) and that Petitioner was too drunk to drive. Since the Commonwealth's evidence showed that Petitioner was drunk shortly before the shooting, Petitioner contends that to require him to actually prove that he was

too drunk to deliberate and premeditate, as required for first degree murder in Virginia (Johnson v. Commonwealth, 135 Va. 524), would be in direct conflict with the Due Process Clause of the Fourteenth Amendment to the United States Constitution as applied in Mullaney v. Wilbur, 95 S. Ct. 1881 (1975).

Commonwealth's Exhibit 9 shows the condition of deceased some time after death. The trial court, without any evidence whatsoever, and indeed contrary to the other evidence, infered that deceased's face had been mutilated (TR 115, line 16). Under no theory can this inference be allowed to stand. Since deceased was found face down (Commonwealth's Exhibits 2 through 7), the blood sepage and discoloration were natural processes.

This case does not involve a situation wherein all evidence was considered and resolved in favor of the Commonwealth, but a situation wherein the trial court openly disregarded the evidence in favor of unwarranted inferences, thereby convicting and sentencing Petitioner according to a jury verdict in a different, unrelated case, all of which is contrary to the law in this Commonwealth and the evidence in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a Writ of Error should be allowed to the judgment of the Circuit Court of the County of Chesterfield, Virginia, entered in this cause on the 21st day of August, 1975, and that the judgment then entered should be reviewed and reversed by this Court.

The attorney for Petitioner adopts this as his opening brief in the event

a Writ of Error is awarded, and does not demand to state orally the reasons for granting the petition.

Pursuant to Rule 5:22 of this Court, your Petitioner is James Alex Jackson; his attorney is Mack T. Daniels, 4401 Old Hundred Road, Chester, Virginia; the respondent is the Commonwealth of Virginia; and the attorney for the Commonwealth of Virginia is Oliver D. Rudy, Commonwealth's Attorney for Chesterfield County, Virginia. There is no other party of interest in the present action.

This petition will be filed in the Clerk's Office of the Supreme Court of Virginia, at Richmond, Virginia, on December 15, 1975.

I certify that on the 12th day of December, 1975, before filing, a copy of this petition was mailed to Oliver D. Rudy, Commonwealth's Attorney for Chesterfield County, Virginia, counsel of record for the Commonwealth of Virginia in this case.

JAMES ALEX JACKSON

By_____
Appointed Counsel

MACK T. DANIELS, ESQUIRE
4401 Old Hundred Road
P. O. Box 580
Chester, Virginia 23831

I, the undersigned Attorney at Law, practicing in the Supreme Court of Virginia, do hereby certify that, in my opinion, the said verdict and conviction complained of should be reviewed and reversed by this Honorable Court.

MACK T. DANIELS

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CITATIONS

APPENDIX B

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 10th day of February, 1976.

The petition of James A. Jackson for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Chesterfield County on the 1st day of August, 1975, in a prosecution by the Commonwealth against the said petitioner for a felony, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, both reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said court, which court shall allow court-appointed counsel the sum of $100 as compensation for services rendered on this appeal, and also his necessary direct out-of-pocket expenses.

And it is ordered that the Commonwealth recover of the plaintiff in error the said amount paid counsel appointed to represent him on this appeal, his necessary direct out-of-pocket expenses, the costs to be taxed by the clerk of this court, the amount paid counsel appointed by the courts below to represent the said petitioner therein, his necessary direct out-of-pocket expenses, and the costs to be assessed in this case by the said courts below.

/

A Copy,

Record No. 751474

Teste:

Howard G. Turner,
Clerk

By:

Deputy Clerk

Costs due the Common-Wealth by plaintiff in error in Supreme Court of Virginia:

Attorney's fee	$100.00 plus his costs and expenses
Filing fee	1.50

Teste:

Howard G. Turner, Clerk

By:

Deputy Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5283

JAMES A. JACKSON,
Petitioner,

vs.

COMMONWEALTH OF VIRGINIA
and
R. ZAHRADNICK, WARDEN,
Respondents.

BRIEF ON THE MERITS IN SUPPORT OF RESPONDENTS SUBMITTED AMICUS CURIAE BY THE STATES OF INDIANA, NEBRASKA, PENNSYLVANIA, UTAH, AND WEST VIRGINIA

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IN THE

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BRIEF ON THE MERITS IN SUPPORT OF RESPONDENTS SUBMITTED AMICUS CURIAE BY THE STATES OF INDIANA, NEBRASKA, PENNSYLVANIA, UTAH, AND WEST VIRGINIA

The State of Indiana, by Theodore L. Sendak, Attorney General of Indiana, Donald P. Bogard, Chief Counsel-Staff, and David A. Arthur, Deputy Attorney General, and the states of Nebraska, Pennsylvania, Utah, and West Virginia, by their respective Attorneys General, pursuant to Rule 42 of the Rules of the Supreme Court of the United States, submit their *amicus curiae* brief on the merits in support of the Respondents in the above-entitled cause.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fourth Circuit and of the United States District Court

for the Eastern District of Virginia are unreported and may be found respectively at pages A30-35 and A25-28 of the Appendix filed by Petitioner.

JURISDICTION

This Court has jurisdiction to review this cause by writ of certiorari pursuant to 28 U.S.C. § 1254(1), and has accepted it for such purposes by granting said writ on December 4, 1978.

CONSENT OF THE PARTIES

The *amicus curiae* brief is filed by the States of Indiana, Nebraska, Pennsylvania, Utah, and West Virginia pursuant to Rule 42 of the Rules of this Court and consent of the parties is not required pursuant to Rule 42(4).

QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit (hereafter "Fourth Circuit") is correct in following *Thompson v. City of Louisville,* 362 U.S. 199 (1962), in reviewing, by way of appeal in ***habeas corpus,*** a conviction for first-degree murder.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

INTEREST OF THE AMICUS

The *amici* submit this brief since the question presented by the Petitioner is as vital to them as it is to Virginia and to all States in the Union. Petitioner seeks to have this Court overrule a long line of cases.

This case involves an attempt by Petitioner to obtain reversal of *Thompson* on the grounds that it is in conflict with *In re Winship,* 397 U.S. 358 (1970). Were *Thompson* overruled and another standard of appellate review on the sufficiency of the evidence established, the case load and the work load per case of the Office of the Attorney General of Indiana would increase substantially, as the Attorney General is counsel in all federal *habeas corpus* actions attacking the validity of Indiana convictions. There are currently numerous federal *habeas corpus* actions challenging the sufficiency of the evidence of guilt in convictions pending in Indiana federal courts. Undoubtedly, numerous other actions are contemplated by Indiana prisoners.

If the rule established by *Thompson* were overturned, the standard of review in criminal appeals to the appellate courts of Indiana and all other states could also be affected, thereby throwing doubt upon the finality of state court judgments of conviction.

STATEMENT OF THE CASE

On March 27, 1975, Petitioner James A. Jackson (hereafter "Jackson") was tried by the court upon an indictment for murder. Jackson was found guilty and awarded

a sentence of thirty years in prison. An appeal to the Supreme Court of Virginia resulted in affirmance on February 10, 1976.

Jackson filed his petition for writ of *habeas corpus* on June 18, 1976, alleging, *inter alia*, that the evidence of his malice or premeditation was insufficient. The United States District Court for the Eastern District of Virginia (hereafter "District Court") granted a writ on October 1, 1976, finding no evidence of premeditation. The Commonwealth of Virginia took a timely appeal to the Fourth Circuit. On August 3, 1978, the Fourth Circuit reversed the District Court, finding evidence of each of the elements of first-degree murder.

The petition for writ of certiorari was granted by this Court on December 4, 1978.

STATEMENT OF THE FACTS

The *amici* rely upon the facts as stated by the Commonwealth of Virginia in its Brief on the merits.

ARGUMENT

The Fourth Circuit Is Correct in Following and Applying Thompson v. City of Louisville in Reviewing, by Way of Appeal in Habeas Corpus, a Conviction for First-Degree Murder

This case arises from the reversal on appeal of a district court judgment granting a writ of *habeas corpus*. While applying the standard of *Thompson v. City of Louisville, supra*, two courts reached different conclusions as to the existence of the evidence in the state court record. Jackson argues that the Fourth Circuit erred in applying *Thompson*, and that the court should instead have applied *In re*

Winship, supra. The two cases are not in conflict as they deal with different topics and with different proceedings.

Thompson arose as a direct appeal from a state court. The case establishes a standard for review on appeal, and deals with the burden of production. *Winship* concerns a fact situation set at the trial court level, and deals with the burden of persuasion. The question in *Winship* is not whether the trial court could have found delinquency beyond a reasonable doubt, but whether a preponderance of the evidence is sufficient to sustain an adjudication of delinquency. The set fact situation is that the trial court acknowledged that the proof did not establish guilt beyond a reasonable doubt. *Winship, supra*, at 360. The court had clearly distinguished between preponderance and reasonable doubt. *Id.*, at 367. In *Winship* the explicit holding is:

> . . . that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *Id.*, at 364.

That holding is conveyed to the jury in every set of instructions in every criminal trial, or else those instructions subject the conviction to reversal upon appeal for lessening the burden that the prosecution must bear. See *Cool v. United States*, 409 U.S. 100, 102 (1972). Every judge who sits as trier of fact is bound by the same standard.

Application of the reasonable doubt standard calls for a "fine resolution of conflicting evidence." *Gerstein v. Pugh*, 420 U.S. 103, 121 (1975). The "fine resolution" requires that the trier of fact make a judgment as to the credibility of witnesses as well as to the weight of the evidence. There has not been a development that would allow resolution of the credibility of a witness from the review of a transcript

at the appellate level. Too many factors are involved in that determination that cannot be contained in a transcript: a break in ones voice; a nervous twitch; a hesitancy; the avoidance of eye contact; the manner in which one speaks, holds his head, crosses his legs, or folds his arms, are but a few of the myriad factors legitimately considered by the trier of fact but which never appear in the "cold record."

A trier of fact is entitled to believe or to disbelieve anyone. Such belief or disbelief is not recorded in the short verdict that is required. Still, jury verdicts are sustained even if the jury would have been justified in having a reasonable doubt and even if a judge would have reached a contrary conclusion. *Johnson v. Louisiana,* 406 U.S. 356, 362 (1972). It is assumed that jurors understand and properly carry out their responsibility to conclude beyond a reasonable doubt. *Id.,* at 361-62. In *Johnson,* decided after *Winship,* this Court upheld a Louisiana statute, stating that in a crime punishable only at hard labor, a guilty vote from nine of twelve jurors was constitutionally permissible as a basis for punishment. There is in the present case no basis for assuming that the judge in Virginia hearing Jackson's criminal trial ignored either the Constitution that he is sworn to uphold or the decision in *Winship* that he is bound to follow. There is no basis for assuming that the trial judge in Virginia applied *Thompson* at the trial level, searching for only some evidence of guilty, knowing that if there were any he would be upheld on appeal. He necessarily concluded that the burden of persuasion had been met.

It has long been the rule on appeal that appellate courts do not sit "to weigh the evidence or to determine the credibility of evidence." *Glasser v. United States,* 315 U.S. 60,

80 (1941); *Hamling v. United States,* 418 U.S. 87, 124 (1974), *rehearing denied* 419 U.S. 885. This Court in *Winship* did not weigh the evidence or determine its credibility. The weight and credibility had already been determined by the trial judge and by the statute involved in that case. *Winship, supra,* at 369 (Harlan, J., concurring). Even the dissenting opinions failed to consider weight or credibility. Assuming, as the appellate courts must, that each fact necessary to constitute the crime charged was found to exist through application of the reasonable doubt standard, the courts then look to see only if there is *justification* for the finding. That is the standard embodied in the holding of *Thompson.* Appellate courts look to the facts produced, not to their persuasiveness. If the appellate courts were to assume that the trial courts and juries would not apply and follow a proper standard, triers of fact would have no function except to serve as an audience. That is not the function envisioned either by the Sixth Amendment or by the decisions of this Court.

Appellate courts look only to the facts produced in the trial courts. In *Thompson,* there were no facts produced from which each element of the offense could be inferred. In *United States v. Romano,* 382 U.S. 136 (1966), this Court held that because proof of the ultimate fact rested upon a presumption once the basic fact is proven, and because the ultimate fact did not follow from the basic fact "beyond a reasonable doubt," there was no proof produced as to the ultimate fact. Presumptions established either by statute or by case law are laws and not facts. Appellate courts do not determine weight or credibility of evidence but only review the law in light of superior law and in light of common experience. In *Romano,* had the presumption of ownership from mere presence been instead presence plus some

reliable indicator of ownership, or had the crime been defined as knowingly being present at a still, the outcome would have been different. This Court simply held that there was no fact produced showing possession, the "fact" having arisen from an invalid legal presumption allowing conviction for presence rather than for possession.

On the other hand, if there is some evidence produced, whether conflicting or not, a trier of fact is fully justified in finding that the evidence is credible and is equally justified in finding that it is not credible. A trier of fact may find one small action or statement more persuasive and credible than all of the other evidence combined. If *Thompson* were rejected, it would be necessary for appellate courts to make determinations of persuasiveness and of credibility. The logical (but admittedly extreme) conclusion would be that quantity would prevail over quality in the "fine resolution of conflicting evidence." If the defendant produces three witnesses to say that he is innocent, the prosecution would have to produce four to say that he is guilty and would have to make a showing on the record that each of the four is credible.

Some testimony is inherently suspect. See *e.g., Crawford v. United States*, 212 U.S. 183 (1909). However, even a pathological liar or a convicted perjurer tells the truth at times. If the testimony showing the guilt of the defendant is given by a proven pathological liar, the jury could still be justified in believing him. The appellate courts, and the federal district courts presiding over *habeas corpus* proceedings, cannot view exactly what the original trier of fact viewed.

When there is no evidence produced, obviously the trier of fact erred in being persuaded, or convicted the person

because of some inappropriate reason. Thompson may well have been convicted because of his past conduct. Dick Gregory may well have been convicted because of his stance on integration. See, *Gregory v. City of Chicago*, 394 U.S. 111 (1969). But when there is any evidence at all produced, the determination of the trier of fact that that evidence, however slight, persuades it of defendant's guilt beyond a reasonable doubt, should not only be entitled to deference but to conclusiveness. Otherwise, appellate courts and courts sitting in *habeas corpus* proceedings will necessarily have to make determinations of weight, of credibility and of persuasiveness, and trials and transcripts will then become longer as the prosecution is forced to prove and re-prove facts and to establish and support the credibility of its witnesses *on the record*. This will be required in order to lessen the possibility that at some point in the future a state appellate or a federal court is going to hold that a particular element was not proven because a witness was not shown beyond a reasonable doubt to have been persuasive and credible when the prosecutor knows and the trier of fact determines that there had never been a more credible or persuasive witness who gave more credible testimony and one look at him would have convinced anyone of that fact. In the transcript, however, his words are in the same size and style of type as those of a person who the trier of fact finds to be lying in that very same trial.

In the present case, it would appear that voluntary intoxication under Virginia law is analogous to sudden heat under New York law. Sobriety is not an element of first-degree murder.

> [V]oluntary drunkenness, when interposed as a *defense* to murder will not be allowed to reduce the offense to manslaughter. *Drinkard v. Common-*

> *wealth of Virginia*, 165 Va. 799, 183 S.E. 251, 253 (1936). (Emphasis supplied.)

The Supreme Court of Appeals of Virginia has also held that:

> . . . when a person voluntarily becomes intoxicated and is thereby led to commit a crime, he cannot be allowed to hide behind his own condition as an excuse. *Cody v. Commonwealth of Virginia*, 180 Va. 449, 23 S.E.2d 122, 123 (1942).

Cody was convicted of first-degree murder. It would appear that under Virginia law, voluntary intoxication is in the nature of an affirmative defense. Voluntary intoxication is thus no different from the affirmative defense of insanity. See, *Rivera v. Delaware*, 429 U.S. 877 (1976). In the instant case nothing is presumed against Jackson. *Cf.*, *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Sobriety or drunkenness is not a "crucial factor" separating two crimes with a substantial difference in punishment. *Patterson v. New York*, 432 U.S. 197 (1977) (dissenting opinion of Powell, J.). Unlike presuming malice from an intentional killing, the prosecution in *Jackson* was required to and did produce evidence of a "willful, deliberate, and premeditated killing." Virginia Code Annotated § 18.2-32; *cf.*, *Mullaney, supra*. The proof produced by the Commonwealth is discussed at pages 5 through 7 of the opinion of the Fourth Circuit. The Commonwealth produced evidence and persuaded the trier of fact. Jackson obviously did not persuade the trier of fact that he was too intoxicated to form the requisite *mens rea*. Statements of the defendant are not taken as unquestionably true. If anything, it is the most questionable evidence. It is a choice that the trier of fact is to make.

> The testimony of the defendant in a criminal case is to be considered and weighed by the jury, taking all the evidence into consideration, and giving such weight to the testimony as in their judgment it ought to have. *Wilson v. United States*, 162 U.S. 613, 621 (1895).

It does not add anything that prosecution witnesses acknowledge that Jackson had been drinking. The trier of fact could and did conclude that Jackson's intoxication did not excuse his crime, taking all of the evidence into account.

Unlike the situation in *Thompson*, and contrary to Jackson's argument, there was evidence produced to show premeditation. *Thompson* is not as Jackson reads it. See pp. 12-13 of the Brief for the Petitioner. As a matter of the substantive law of Kentucky, arguing with a policeman is not disorderly conduct, and mere presence is not loitering. Under Jackson's reading of *Thompson*, evidence of *some* element would be enough to meet the Due Process Clause rather than some evidence of *each* element. This is the same standard embodied in Rule 29(a), Federal Rules of Criminal Procedure. "Insufficient" as used in that rule means a modicum of evidence as to each element.

Jackson argues that no rational trier of fact could have found him guilty beyond a reasonable doubt. Even if "the Commonwealth of Virginia recognizes that a mind may be so bewildered from intoxicating beverages as to be entirely incapable of premeditation" (Brief for the Petitioner, p. 20), the trier of fact was not bound to conclude in this case that Jackson was "bewildered" to that degree. A person may be intoxicated to the point where he could be convicted of driving under the influence, but still be capable of comporting his actions to the dictates of law, capable of recognizing right from wrong, and capable of forming intent.

Jackson in his argument overlooks several facts. Jackson and Mrs. Cole argued. Jackson struck Mrs. Cole with the butt of the revolver. Jackson emptied and then reloaded his revolver while his "attacker" watched idly. Mrs. Cole was shot twice, from two different angles.

The Commonwealth has clearly met its burden of production. There is evidence of each element of the crime of murder in the first degree.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully urge this Court to affirm the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States
October Term, 1978

No. 78-5283

JAMES A. JACKSON,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA
AND R. ZAHRADNICK, WARDEN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF ON BEHALF OF THE RESPONDENT BY THE STATE OF GEORGIA AS AMICUS CURIAE

Respectfully submitted,

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (A. 30-35) is not reported. The opinion of the United States District Court for the Eastern District of Virginia (A. 25-28) is not reported.

PRELIMINARY STATEMENT

Comes now the State of Georgia, by and through its Attorney General, by invitation of the Respondent, and files its Brief Amicus

Curiae in the above-styled cause on behalf of the Respondent.

QUESTION PRESENTED

Whether on review by federal courts of a State prisoner's conviction by means of his petition for a writ of habeas corpus, it is only necessary that "some evidence" be shown in order to support his conviction or whether the "reasonable doubt" standard is now the applicable standard to determine whether a conviction is properly supported by the evidence?

ARGUMENT

The United States Court of Appeals for the Fourth Circuit found that they were bound by the "some evidence" rule set forth in Thompson v. City of Louisville, 362 U.S. 199 (1960), in determining whether or not there was sufficient evidence in the instant case to support the conviction of the Petitioner. Petitioner seeks to assert that the proper standard by which the evidence supporting Petitioner's conviction should be viewed is that standard set forth in In re: Winship, 297 U.S. 358 (1970), and that this case requires federal courts to make a determination of whether a rational trier of fact could have found the petitioner guilty of first degree murder beyond a reasonable doubt. It is to this issue, as to the proper standard by which federal courts may review the sufficiency of evidence to support a federal habeas corpus petitioner's conviction, that the State of Georgia files its Amicus Curiae brief.

In Fay v. Noia, 372 U.S. 391 (1963), this Court, in tracing the development of the writ of habeas corpus in federal courts, noted the tremendous power of the federal habeas corpus courts. This Court determined that a federal habeas corpus court may grant relief despite a petitioner's failure to have pursued a state remedy available to him at the time he applies for a writ of federal habeas corpus. This power of the federal courts in dealing with habeas corpus petitions must also be viewed in light of the traditional rule that habeas corpus proceedings are governed by equitable principles. Id. at 438. Therefore, the question then becomes what is the appropriate exercise of a federal habeas corpus court's power, viewing habeas corpus as a type of equitable proceeding.

In determining what is an appropriate exercise of a federal district court's power in the area of habeas corpus, considerations such as comity and the orderly administration of justice must not be ignored.

In support of his position that the case of In re: Winship is the standard by which the sufficiency of the evidence must be reviewed by a federal habeas corpus court, Petitioner cites Stone v. Powell, 428 U.S. 465 (1976). Specifically, Petitioner refers to Footnote 31 of that opinion of this Court as strongly suggesting that in a case where innocence is "strongly implicated" the innocence-guilt value should override the policy of state autonomy. The State of Georgia does not read this implication from Footnote 31. The first paragraph of this footnote reads as follows:

> "Resort to habeas corpus, especially for purposes other than to assure that no

innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government. They include '(i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimalization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded. 'Schneckloth v. Bustamonte, 412 U.S., at 259, 36 L.E.2d 854, 93 S.Ct. 2041 (Powell, Jr. concurring). See also Kaufman v. United States, 394 U.S., at 231, 22 L.E.2d 227, 89 S.Ct. 1068 (Black, Jr., dissenting) . . . .' "

In Footnote 31 this Court has recognized the very values which the State of Georgia asserts are in danger of violation should the "reasonable doubt" test of In re: Winship be used to review the sufficiency of the evidence to support state habeas corpus prisoners' convictions.

This Court also stressed the importance of these values enumerated above in Footnote 11 of the decision in Stone v. Powell, supra, by recognizing the equitable nature of the writ of habeas corpus and quoting this Court's previous decision in Francis v. Henderson, 425 U.S. 536 (1976), for the proposition that:

" 'This Court has long recognized that in some circumstances considerations of comity and concerns

for the orderly administration of criminal justice require a federal court to forego the exercise of its habeas corpus power.' "

These principles will be violated if federal habeas corpus is expanded so as to become, in effect, an additional appellate court for reviewing the sufficiency of the evidence to support state court convictions.

Of course, the majority of this Court in Stone v. Powell, supra, specifically delineated an exception to full review by a federal habeas corpus court as to particular categories of constitutional claims. Stone v. Powell serves as an example of an instance in which this Court has determined that certain forms of review would be inappropriate for a federal court to exercise in the habeas corpus area, although these forms of review are totally within their power.

In Francis v. Henderson, 425 U.S. 536 (1976), this Court also recognized the importance of comity, in holding that a state prisoner who fails to make a timely challenge to the composition of the Grand Jury that indicted him may not use the avenue of federal habeas corpus to make such a challenge unless actual prejudice is shown.

The State of Georgia wishes to assert that notions of comity, concerns for the orderly administration of justice, and the necessity of finality in criminal trials are but some of the concerns that compel this Court to limit the review which a federal court should exercise in determining the sufficiency of evidence to support state court convictions. In the State of Georgia, the habeas corpus caseload becomes

increasingly heavier as each year passes. To expand habeas corpus review to include a review of the sufficiency of the evidence to support a conviction under the "reasonable doubt standard," would create almost an intolerable burden for both state habeas corpus courts, as well as for the State Attorney General, in responding to federal habeas corpus petitions by state prisoners.

In effect, the federal habeas corpus court would be making a de novo review of issues which either have been or could have been reviewed by both the trial judge, by means of a motion for new trial, and by the state appellate courts on direct appeal. Some weight should be given by the federal habeas corpus courts to the findings of the trial court and the state appellate courts as to the sufficiency of the evidence to support a habeas corpus petitioner's conviction. An expansion of the "some evidence" standard to the "reasonable doubt" standard would in effect be entirely disregarding the earlier findings of the state courts and provide an entirely new avenue of review. This would completely disregard traditional notions of comity between federal and state governments.

The resulting increase in the number of federal habeas corpus petitions filed by state prisoners is obvious and could potentially create such an onerous burden as to interfere with the orderly administration of criminal justice and the speedy resolution of the claims of habeas corpus petitioners.

The State of Georgia, on behalf of the Respondent, urges that the In re: Winship "reasonable doubt" standard should not be interpreted as to have expanded the applicable

standard of "some evidence" enunciated in Thompson v. City of Louisville. To do so would violate traditional notions of comity and interfere with the orderly administration of justice and the speedy resolution of all federal constitutional claims.

CONCLUSION

For these reasons, Amicus respectfully requests this Court to uphold the holding of the Court of Appeals for the Fourth Circuit in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Walden, a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief on Behalf of the Respondent by the State of Georgia as Amicus Curiae upon the following persons by depositing a copy of same in the United States mail, with proper address and adequate postage to:

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This 7TH day of MARCH, 1979.

JOHN C. WALDEN